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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, *et al.*,
Petitioners,

v.

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

When a court of appeals has rendered a decision on the law of a state within its circuit and exactly the same question of state law is later presented to another court of appeals, what amount of deference is due the prior decision of the "home" circuit?

In particular, did the United States Court of Appeals for the District of Columbia Circuit err when it refused to defer to a prior decision of the Eighth Circuit (applying Missouri law to an identical set of facts) that under Missouri law "response costs" incurred for government-ordered environmental remediation are not "damages" covered by general liability insurance policies, even though the D.C. Circuit cited no existing Missouri precedent that the Eighth Circuit had overlooked, nor any superseding enactment by the Missouri legislature, nor any subsequent ruling by the Missouri Supreme Court, nor any other Missouri appellate court addressing the issue?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, eighteen insurers,[1] petition for a writ of certiorari and ask this Court to reverse the judgment below.

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[1] Petitioners here are as follows: The Continental Insurance Company, First State Insurance Company, Hartford Accident & Indemnity Company, Aetna Casualty & Surety Company, American Employers' Insurance Company, Employers Commercial Union Insurance Company, The Travelers Indemnity Company, American Home Assurance Company, Insurance Company of North America, The Insurance Company of the State of Pennsylvania, Lexington Insurance Company, Harbor Insurance Company, American Re-Insurance Company, Unigard Security Insurance Company, Continental Casualty Company, North Star Reinsurance Corporation, Stonewall Insurance Company, and Certain Underwriters at Lloyd's, London. Respondents are Independent Petrochemical Corp., The Charter Company, Charter Oil Company, the State of Missouri, and the United States.

Pursuant to Rule 29.1 of the Rules of this Court, a list naming parent companies and subsidiaries (except wholly-owned subsidiaries) of the corporate petitioners is set forth as Appendix G herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported as *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 944 F.2d 940 (D.C. Cir. 1991), and is Appendix A to this Petition. The district court's unreported opinion is Appendix B. An earlier opinion addressing other issues in the litigation below is reported at 654 F. Supp. 1334 (D.D.C. 1986).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on September 13, 1991 (Appendix A). On November 5, 1991, the court of appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* (Appendix D). This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652 (1988), provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

The pertinent section of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a), is set forth in Appendix E herein.

STATEMENT OF THE CASE

1. From 1970 to 1972, the Northeastern Pharmaceutical and Chemical Co. ("NEPACCO") manufactured chemicals in Missouri at a plant owned by Syntex Agribusiness, Inc. ("Syntex"). The manufacturing process produced waste which contained dioxin. NEPACCO asked

Respondent Independent Petrochemical Corp. ("IPC"), a wholesale supplier of bulk chemicals, to help NEPACCO arrange for the disposal of its waste. IPC then contacted waste oil handler Russell Bliss who accepted NEPACCO's waste for disposal and, after mixing it with waste oil, sprayed it as a dust suppressant at various locations in Missouri. Dioxin contamination resulted.

2. Both NEPACCO and IPC had purchased Comprehensive General Liability ("CGL") insurance policies which obligated the insurers to:

> pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence . . . .

Under the leading case of *Aetna Casualty & Surety Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955), the phrase "as damages" in the insuring clause of CGL policies was understood to limit coverage to "legal claim[s] for damages" against the insured. The cost of "complying with an injunctive decree," such as a government order requiring the removal of waste from another's property (a cost which could far exceed the actual property value), was not within the grant of coverage. *Id.*, *citing Desrochers v. New York Casualty Co.*, 99 N.H. 129, 106 A.2d 196 (1954).

3. Congress subsequently passed the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.* Under CERCLA § 9607(a), persons who generate or dispose of hazardous substances are liable for "response costs," *i.e.*, the costs of the removal or remediation of contamination (§ 9607(a)(4)(A) and (B)). It has been the consistent position of the United States and the courts that, in contrast to an action at law for damages, a suit for CERCLA response costs is "plainly . . . equitable in nature," and therefore a defendant has no right to a jury trial. Brief

for the United States in Opposition to Petition for Writ of Certiorari at 22 n.18, *Northeastern Pharmaceutical and Chem. Co. v. United States*, No. 87-63 (U.S. Sup. Ct. 1987); *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

A separate provision of CERCLA, § 9607(a)(4)(c), provides that those who generate or dispose of hazardous substances may also be liable for "damages for injury to . . . natural resources . . . ." In CERCLA actions for natural resources damages, unlike equitable claims for response costs, the parties are entitled to a jury trial. *In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution*, 712 F. Supp. 994, 1001 (D. Mass. 1989).

4. Acting pursuant to CERCLA, the U.S. Environmental Protection Agency ("EPA") and the State of Missouri implemented a plan to remediate dioxin contamination at the Missouri sites. IPC's potential joint liability for the remediation is expected to be at least $96,000,000. The EPA and the State of Missouri each filed a CERCLA action against NEPACCO and IPC in federal district court in Missouri to recover their response costs; damages for injury to natural resources were not sought.

5. In November 1983, IPC brought an action in the United States District Court for the District of Columbia seeking a declaration of entitlement to insurance coverage for, *inter alia*, CERCLA response costs incurred in connection with the Missouri dioxin contamination. The sole basis for jurisdiction was diversity (28 U.S.C. § 1332). None of the parties has a principal place of business or is incorporated in the District of Columbia. Venue was proper because the District of Columbia's insurance statutes permit service of process on the defendant insurers (28 U.S.C. § 1391(a) and (c)).

While IPC's coverage suit was pending in the District of Columbia, NEPACCO's insurer filed an action in fed-

eral district court in Missouri seeking a declaratory judgment that insurance did not cover CERCLA response costs incurred in connection with the Missouri dioxin contamination. Thus, both the *IPC* and the *NEPACCO* coverage actions involved the same dioxin contamination in Missouri and the same insurance policy language.

6. The district court in *NEPACCO* granted summary judgment for the insurer. On appeal, the United States Court of Appeals for the Eighth Circuit, *en banc*, affirmed, holding that under Missouri law the obligation to cover "damages" created by a CGL insurance policy does not extend to a policyholder's liability for CERCLA response costs. *See Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co.*, 842 F.2d 977, 985-86 (8th Cir. 1988) (*en banc*), *cert. denied*, 488 U.S. 821 (1988):

> In the insurance context . . . the term "damages" is not ambiguous, and the plain meaning of the term "damages" as used in the insurance context refers to legal damages and does not include equitable monetary relief. *See Maryland Casualty Co. v. Armco, Inc.*, [822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988)] . . . . "The obligation of the insurer to pay is limited to 'damages,' a word which has an accepted technical meaning in law." *Hanna*, 224 F.2d at 503. Although not defined in the CGL policies, "[t]he word 'damages' is not ambiguous in the insurance context. Black letter insurance law holds that claims for equitable relief are not claims for 'damages' under liability insurance contracts." *Maryland Casualty Co. v. Armco, Inc.*, (citations omitted).

The *NEPACCO* court additionally found its construction of "damages" to be consistent with the distinction drawn in insurance law between money damages and injunctive relief, as well as with the statutory scheme of CERCLA which differentiates between damages, a legal remedy, and response costs, which are equitable in nature.

Both participating judges from Missouri joined the *en banc* majority opinion. Circuit Judge McMillian, who wrote the opinion, had more than 20 years of service as a Missouri state trial and appellate judge before joining the Eighth Circuit. Circuit Judge Bowman is a former dean of the University of Missouri Law School. II Almanac of the Federal Judiciary (1989).

Circuit Judge Heaney, writing for the three dissenting judges, argued that the word "damages" should be given a construction that would encompass CERCLA response costs (842 F.2d at 988). The dissenters also sought to distinguish the coverage cases on which the majority relied, *see e.g., Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988). This Court denied certiorari (488 U.S. 821 (1988)).

7. In the *IPC* coverage action in the District of Columbia, the same legal issue—whether as a matter of Missouri law response costs are "damages" under CGL insurance policies—was briefed to the court. The district judge deferred to the *en banc* decision of the Eighth Circuit in *NEPACCO*, granting the insurers' motion for partial summary judgment. *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, No. 83-3347 (D.D.C. Sept. 7, 1988) (Appendix B at 199a): ("The court finds no basis to conclude that the *en banc* Eighth Circuit has ignored clear signals from the courts of Missouri, and accordingly, will follow the *NEPACCO* precedent here . . . .").

8. IPC appealed and the D.C. Circuit reversed, adopting the reasoning of the *NEPACCO* dissent. *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 944 F.2d 940 (D.C. Cir. 1991) ("*IPC*") (Appendix A herein). The D.C. Circuit acknowledged that there is a principle of deference to a circuit that has previously decided a question of the law of a state within its boundaries (the "home" circuit), citing *Factors Etc., Inc. v. Pro Arts, Inc.*,

652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982), and its own decision in *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119 (D.C. Cir. 1986). The D.C. Circuit refused to defer to *NEPACCO*, however, because in the panel's view, while recognizing and citing the applicable Missouri law cases, the Eighth Circuit "fail[ed] to apply [them]." (944 F.2d at 945, Appendix A at 10a).

In reaching that conclusion, and in contradiction of the standard of deference that had been articulated by the Second Circuit in *Factors*, the D.C. Circuit cited no Missouri precedent that the Eighth Circuit had overlooked, nor any superseding enactment by the Missouri legislature, nor any subsequent ruling by the Missouri Supreme Court,[2] nor, for that matter, any subsequent ruling by any Missouri appellate court.[3] In the final analysis, the *IPC* panel substituted its own reasoning for that of the Eighth Circuit and embraced the *NEPACCO* dissent. The D.C. Circuit denied a petition for rehearing and suggestion for rehearing *en banc*.

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[2] In *Jones Truck Lines, Inc. v. Transport Ins. Co.*, No. 72650 (Mo. July 13, 1990), the Missouri Supreme Court refused an attempt by the United States Court of Appeals for the Third Circuit to certify the "as damages" issue to the Missouri Supreme Court for its decision. In its order, the court declared that the certification statute passed by the Missouri legislature in 1989, Mo. Stat. Ann. § 477.004 (Vernon Supp. 1989), violated the Missouri constitution. The case settled before the Third Circuit was required to decide the proper standard of deference to *NEPACCO*. *See Jones Truck Lines, Inc. v. Transport Ins. Co.*, 29 Env't. Rep. Cases (BNA) 1605 (E.D. Pa. 1989).

[3] Having earlier recognized the unreliability of isolated trial court decisions (one trial court decision "does not a 'clear signal' make," *Abex*, 790 F.2d at 126 n.33), in *IPC* the D.C. Circuit took just the opposite tack. The court found comfort in an unreported opinion of a Missouri trial court that some—but not all—response costs should be covered as "damages" under Missouri law. *IPC*, 944 F.2d at 945-46 (Appendix A at 10a), *citing Cooper Industries, Inc. v. American Mutual Liability Ins. Co.*, No. 864-00284 (Mo. Cir. Ct. St. Louis Sept. 8, 1989) (Appendix F herein).

9. Following the D.C. Circuit decision, the Eighth Circuit declined to alter *NEPACCO* and reached a similar conclusion with regard to Arkansas law, reasoning that there is no material difference between Arkansas and Missouri law. *C.C. Grisham v. Commercial Union Ins. Co.*, No. 89-1481, 1991 WL 257430 at p.3 (8th Cir. December 9, 1991); *Parker Solvents Co. v. Royal Ins. Cos. of America*, No. 90-2224, 1991 WL 257413 at p.1 (8th Cir. December 9, 1991). In *Parker Solvents*, the Eighth Circuit acknowledged disagreements among the circuits on this state law issue, which it intimated were more a reflection of differing views toward the public policy implications of insurance coverage for CERCLA response-cost liability (1991 WL 257413 at p.1) than a disagreement about state law principles:

> [s]tandard form CGL insurance policies use virtually the same language around the country, and general principles of insurance law do not vary greatly from state to state. The real issue, of course, is whether the insurance industry should be compelled to help finance an immense environmental cleanup obligation that was not anticipated, by insureds or insurers, at the time these policies were written. On this difficult issue, which transcends state boundaries and has important public policy implications, it is not surprising that judges disagree.

REASONS FOR GRANTING THE WRIT

The standard of deference a court of appeals owes to a "home" circuit's interpretation of state law is an important question on which the D.C. and Second Circuits disagree; this case, involving an insurance coverage issue of substantial importance, presents an appropriate case for resolving that question.

The standard of deference one circuit owes to a prior decision of another, on issues of the law of a state within the latter circuit's boundaries, is an important federal question which has not been addressed by this Court. Sup.

Ct. R. 10.1(c). The D.C. Circuit's standard of deference is in direct conflict with the standard the Second Circuit has articulated. Sup. Ct. R. 10.1(a). The determination of a significant and recurring issue of state law—insurance coverage for CERCLA response-cost liability—should not hinge on the circuit in which a litigant has chosen to file its action.

1. Both courts and commentators have expressed differing views concerning the required standard of deference to a decision made by a court of appeals on the law of a state within its boundaries. Over a decade ago, in *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2nd Cir. 1981), *cert. denied*, 456 U.S. 972 (1982), the Second Circuit held that "conclusive deference should be given" to a home circuit's decision unless it had missed existing, contrary precedents or been superseded by legislative enactment or a ruling of the state's highest court (*id.* at 283 (citation omitted)):

> A federal court in another circuit would be obliged to disregard a state law holding by the pertinent court of appeals if persuaded that the holding had been superseded by a later pronouncement from state legislature or judicial sources . . . or that prior state court decisions had been inadvertently overlooked . . . . Where, as here, the pertinent court of appeals has essayed its own prediction of the course of state law on a question of first impression within that state, the federal courts of other circuits should defer to that holding, perhaps always, and at least in all situations except the rare instance when it can be said with conviction that the pertinent court of appeals has disregarded clear signals emanating from the state's highest court pointing toward a different rule.[4]

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[4] The *Factors* decision prompted a spirited academic debate concerning the merits of the rule of conclusive deference. For favorable treatment of *Factors*, see Elizabeth Schneider, Note, *Deference to One Circuit Court's Decision by Another Circuit:* Factors Etc.,

The *Factors* standard of deference is objective—unmistakable in its terms and straightforward to apply. The D.C. Circuit, however, has adopted a subjective standard of deference which allows it both to substitute its own reasoning for that of the home circuit and to take into account "signals" by courts other than the state's highest court. *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 125-26 (D.C. Cir. 1986). The *IPC* panel articulated this standard thus (944 F.2d at 945, Appendix A at 9a):

> Under *Abex*, we will not follow another circuit's decision if that court "ignored clear signals emanating from the state courts" or "*clearly misread* state law." 790 F.2d at 125-26 (emphasis in original). . . .

Applying that subjective standard, the *IPC* court rejected the *en banc* Eighth Circuit decision in *NEPACCO* by, for the most part, simply embracing the *NEPACCO* dissent. In rejecting the *en banc* Eighth Circuit's considered view of Missouri law by essentially reaching a different conclusion on the same arguments decided by that court, the D.C. Circuit rejected the strict deference standard set forth by the Second Circuit in *Factors*.

2. The Second Circuit's standard of "conclusive" deference—unless the home circuit decision has been superseded by a later pronouncement from the state's legisla-

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Inc. v. Pro Arts, Inc., 17 New Eng. L. Rev. 1061 (1982); William H. Jestings, Note, *Recognizing the Need for a Uniform System of Federal Comity in Diversity Decisions*, 16 Suffolk U. L. Rev. 787 (1982). For criticism of *Factors* see Charles A. Wright, *The Law of Federal Courts* 376-77 (4th ed. 1983); Edna Hanovice, Note, *Ascertaining Undefined State Law Under the* Erie *Doctrine:* Factors Etc., Inc. v. Pro Arts, Inc., 62 B.U. L. Rev. 817 (1982); D. Neil Radey, Note, *Circuit Court of Appeals Must Accord Conclusive Deference to Another Circuit's Determination of the Law of a State Within the Other Circuit:* Factors Etc., Inc. v. Pro Arts, Inc., 67 Cornell L. Rev. 415 (1982); Craig. A. Hoover, Note, *Deference to Federal Circuit Court Interpretations of Unsettled State Law:* Factors Etc., Inc. v. Pro Arts, Inc., 1982 Duke L.J. 704.

ture or highest court—avoids inconsistent treatment of the same state law issue in different cases, eliminates an incentive for forum-shopping, and promotes orderly development of state law. "Conclusive" deference thus promotes the twin aims of *Erie Railway Co. v. Tompkins*, 304 U.S. 64 (1938)—the "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Adherence to the state law rulings of a home circuit also promotes judicial economy by reducing disagreements within the federal judiciary about state law. "Diversity jurisdiction, especially in its post-*Erie* incarnation, should not create needless diversity in the exposition of state substantive law." *Factors*, 652 F.2d at 283. The *Factors* court expressed the benefits of its objective deference standard thus (652 F.2d at 282 (footnote omitted)):

> [T]he opportunities for federal court departure from the normal paths of state law development should be held to a minimum, for the benefit of both the orderly development of state law and fairness to those subject to state law requirements . . . . Fairness to the public is promoted by making clear that there is a single, authoritative answer to the particular state law issue, instead of leaving the matter subject to the varying interpretations of the courts of appeals for the several circuits.

Consider the unfairness created by the irreconcilable rulings of the Eighth and D.C. Circuits on whether response costs are covered "damages" under Missouri law. The petitioners are at risk for tens of millions of dollars of response costs only because IPC sued in the District of Columbia, not in Missouri. One of the petitioners, Continental Insurance Company, insured both IPC and NEPACCO. That carrier finds itself obligated to cover the CERCLA response costs of IPC, but not of NEPACCO. This inconsistency occurs even though the same insurance policy language is applied to precisely the same set of

facts, and the policies are interpreted under the law of the same state. The only reason for this contradiction is the circuit in which the plaintiff elected to bring suit.

And the potential for further inconsistency, and its adverse impact on the administration of state law in the federal court system, is even greater. In *Jones Truck Lines*, the same legal issue, under Missouri law, based on the same dioxin contamination, was in litigation in the Third Circuit (see n.2 *supra*). Had that action not settled, the Third Circuit would have had to decide what rule of deference to apply—the Second Circuit rule, the D.C. Circuit rule, or still another rule—in order to resolve the split between the Eighth and D.C. Circuits. The forum-shopping implications are clear. The result is unacceptable. As the Second Circuit stated in *Factors* (652 F.2d at 283):

> lawyers frequently have to advise clients concerning unsettled issues of law, but the exercise of diversity jurisdiction should not add to their uncertainty.

3. While finding that courts of appeals may not defer to federal district courts on interpretations of state law, in *Salve Regina College v. Russell*, —— U.S. ——, 111 S.Ct. 1217 (1991), this Court restated the very principles that support a rule of conclusive deference to the home circuit. Deference to home circuit decisions avoids the "divergent development of State law" (*id.* at 1222) that is inimical to the interests of federalism. It also avoids the "dual system of enforcement of state-created rights in which the substantive rule applied to a dispute may depend on the choice of forum." *Id.* Most importantly, deference to the home circuit promotes the "twin aims" of *Erie* quoted above. *Id.*

Here, to the contrary, two federal courts of appeals have reached opposite conclusions and thus litigants are subjected to inconsistent judgments based only on the fortuity of where the plaintiff filed suit. Such a result should be impermissible in a federal system designed to

treat similar litigants similarly and, to the extent possible, to avoid unnecessary intrusions into the development of state law.

4. Deference is also important to maintain uniformity of decisions among the federal courts of appeals in view of this Court's well-established policy of not granting certiorari to resolve state law conflicts. When one circuit disagrees with another on a significant question of federal law, this Court grants certiorari to resolve the conflict. This Court, however, has an announced policy of not granting certiorari to resolve conflicts between the circuits on issues of state law. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938). *Cf. Huddleston v. Dwyer*, 322 U.S. 232 (1944) (remanding state law question to court of appeals for reconsideration in light of conflicting state court decision).

When this Court has been presented with issues of state law, however, it has repeatedly expressed a policy of deference to the court of appeals most familiar with the state's law. *See Salve Regina College v. Russell*, 111 S.Ct. 1217, 1223 n.5 (1991) (distinguishing deference to courts of appeals from deference to district courts); *Granberry v. Greer*, 481 U.S. 129, 136 n.9 (1987) ("we defer to the Court of Appeals which is more familiar with Illinois' practice than we are"); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485 n.13 (1986) ("great deference to the interpretation and application of state law by the courts of appeals"); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 224 n.10 (1985) ("we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) ("courts of appeals are better schooled in and more able to interpret the laws of their respective States . . . . The rule is not ironclad, however . . ."); *MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280 (1942).

Only a strong policy of conclusive deference can simultaneously conserve this Court's resources, promote the policies this Court has found to be important, and avoid unseemly conflicts among the circuits on state law questions.

CONCLUSION

The D.C. Circuit erred in failing to defer to the Eighth Circuit's decision that CERCLA response costs are not "damages" under Missouri law. The D.C. Circuit's standard of deference is in conflict with the standard of deference articulated by the Second Circuit in *Factors*. Resolution of that conflict is essential to the proper administration of the federal courts and the orderly development and authoritative exposition of state law.

Petitioners respectfully pray that this Court will grant their petition and reverse the decision below.

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Dated: February 3, 1992

Supreme Court, U.S.
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No. 91-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, *et al.*,
Petitioners,

v.

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 14, 1991 Decided September 13, 1991

No. 89-5367

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Appellants

v.

AETNA CASUALTY AND SURETY COMPANY, *et al.*

No. 89-5368

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Appellants

v.

AETNA CASUALTY AND SURETY COMPANY, *et al.*

Appeals from the United States District Court
for the District of Columbia

(Civil Action No. 83-03347)

John H. Gross, with whom *Jerold Oshinsky*, *Sherry W. Gilbert*, *Robert H. Shulman* and *Stephan G. Weil* were on the brief, for appellants in 89-5367 and 89-5368.

Dennis M. Flannery, with whom *W. Scott Blackmer* was on the brief, for appellee Insurance Company of North America, in 89-5368.

Paul L. Friedman, with whom *Anne D. Smith* was on the brief, for appellee, Pacific Indemnity Company, in 89-5367. *Lloyd H. Randolph* also entered an appearance for appellee.

Richard B. Stewart, Assistant Attorney General, *Anne S. Almy*, *Steven R. Baer* and *Catherine M. Flanagan*, Attorneys, Department of Justice, were on the brief, for amicus curiae, in 89-5367 and 89-5368 urging that the Order granting Summary Judgment to Independent Petrochemical Corporation's insurers be reversed.

James P. Schaller and *Timothy R. Dingilian* entered appearances for appellees, American Home Assurance Company; Insurance Company of the State of Pennsylvania; and Lexington Insurance Company, in 89-5367 and 89-5368.

James E. Rocap, III, *Niki Kuckes* and *Martin D. Minsker* entered appearances for appellee, Aetna Casualty and Surety Company, in both cases.

Peter J. Schlesinger entered an appearance for appellee, The Travelers Indemnity Company, in both cases.

Robert E. Heggestad entered an appearance for appellee, Harbor Insurance Company, in both cases.

Joseph F. Cunningham entered an appearance for appellee, Stonewall Insurance Company, in both cases.

James W. Green entered an appearance for appellees, American Re-Insurance Company, et al., in both cases.

Before: EDWARDS, WILLIAMS, and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: This diversity case reaches us on appeal after eight years of litigation in the district court about matters that have no connection whatever to the District of Columbia. The litigation, which involves a wide array of complex issues, is continuing. *See Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 654 F. Supp. 1334 (D.D.C. 1986). With respect to two claims, the court below entered final judgments pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, after finding "no just reason for delay." The first of these claims presents the question whether, under the law of the State of Missouri, insurance policies providing reimbursement for "damages" awarded against the insured include sums representing the cost of remedying environmental harm for which the insured is legally responsible. The second claim, also governed by state law, raises the question whether a particular policy issued by Pacific Indemnity Company continued to cover Independent Petrochemical Corporation after it became a wholly-owned subsidiary of plaintiff Charter Oil Company, which is owned by plaintiff The Charter Company.

With respect to the first claim, the facts, as set forth by the district court, are these. In 1971, Independent Petrochemical agreed to assist one of its Missouri customers in disposing of waste material containing "dioxin," a family of chemical compounds that, in sufficient concentrations, may cause serious harm to humans, animals and plants. Independent Petrochemical hired Russell M. Bliss, an independent contractor, to do the job. Bliss transported more than 20,000 gallons of the hazardous waste in his tank trucks to a facility in Frontenac, Missouri, where he mixed it with waste oil and emptied the resulting mixture into storage tanks. Bliss later sprayed the mixture to suppress dust at various sites in eastern Missouri. 654 F. Supp. at 1339.

In order to cure the harm resulting from Bliss's activities, the federal government and the State of Missouri undertook environmental cleanup activities costing mil-

lions of dollars. In an action by the United States seeking reimbursement from Bliss, Independent Petrochemical, its affiliated corporations and others, the United States District Court for the Eastern District of Missouri held Independent Petrochemical jointly and severally liable for these costs under section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607(a). *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987). Missouri also sued Independent Petrochemical to recover its cleanup costs. *Missouri v. Independent Petrochemical Corp.*, No. 83-2670-C (E.D. Mo. filed Nov. 23, 1983). Independent Petrochemical's potential joint liability is estimated to be at least $96 million. The company is insolvent.[1] Under a plan of liquidation approved by the United States Bankruptcy Court for the Middle District of Florida, Independent Petrochemical will continue to defend the CERCLA claims against it and pursue coverage from its insurers.

Between 1971, when Independent Petrochemical agreed to assist its customer in disposing of the hazardous waste material, and 1983, when this case began, Independent Petrochemical purchased 67 Comprehensive General Liability policies from the 23 insurers named as defendants in the court below.[2] The Comprehensive General Liability Policy is a standard-form insurance policy drafted by insurance representatives under the sponsorship of the Insurance Service Office, a trade association that provides drafting assistance to about 3,000 insurers. The parties

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[1] Independent Petrochemical, The Charter Company and Charter Oil initiated chapter 11 proceedings in the United States Bankruptcy Court for the Middle District of Florida in 1984. That court approved a settlement of the federal government's claims against The Charter Company and Charter Oil, and approved each company's plan of reorganization. The United States later dismissed its claims against the two companies. *See United States v. Bliss*, 667 F. Supp. 1298, 1302 n.1 (E.D. Mo. 1987).

[2] Only 21 of the insurers have entered appearances in this court. The two that have not appeared are in liquidation.

agree that each of these 67 policies contained language such as the following:

> The [insurance] company will pay on behalf of the insured [Independent Petrochemical] all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence. . . .

None of the policies defined the term "damages."

In November 1983, two weeks before Missouri brought its CERCLA action, Independent Petrochemical and its affiliated corporations brought this suit for a declaratory judgment. Jurisdiction rested on diversity of citizenship. 28 U.S.C. § 1332. Although Independent Petrochemical had its principal place of business in Missouri, where the incidents giving rise to this dispute occurred, and although none of the parties are incorporated in the District of Columbia, the case could be brought here apparently because the District of Columbia's Superintendent of Insurance accepts service of process for the defendant insurers (D.C. CODE ANN. § 35-423), which is sufficient to lay venue under the expansive provisions of 28 U.S.C. § 1391(a) & (c). Among other claims, plaintiffs sought a judgment that the provision just quoted obligates Independent Petrochemical's insurers to cover liability for environmental cleanup costs incurred by the United States and Missouri.

While this litigation proceeded, the United States Court of Appeals for the Eighth Circuit, sitting *en banc*, held in a five-to-three decision that under Missouri law "the term 'damages' in the standard-form comprehensive general liability insurance . . . policy does not include cleanup costs" (*Continental Ins. Cos. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977, 979 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988) ("*NEPACCO*")). *NEPACCO* not only dealt with the identical issue now facing us, but also arose out of the same factual cir-

cumstances. The hazardous waste Bliss handled under his agreement with Independent Petrochemical was NEPACCO's. The Eighth Circuit's decision relieved Continental Insurance Company of any contractual duty under the policy to reimburse NEPACCO for cleanup cost incurred by the state and federal governments, costs NEPACCO was legally obligated to pay under CERCLA.

Because *NEPACCO* was rendered by the "home circuit" for Missouri, the district court in this case treated the decision with deference. Finding no basis for concluding that the Eighth Circuit had ignored clear signals from the Missouri courts, the court followed the *NEPACCO* "precedent with respect to those policies not containing a choice-of-law provision directing the application of the law of some other state." *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, No. 83-3347, mem. op. at 220 (D.D.C. Sept. 7, 1988).[3] The court therefore granted the insurers' motions for partial summary judgment.[4]

I

Our duty in this case, as in any diversity case, is to "ascertain and apply the state law" (*Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944)). The parties agree that under the District of Columbia's choice of law rules, Missouri law governs the interpretation of the insurance policies and of the term "damages." *See Bledsoe v. Crowley*, 849 F.2d 639, 641 (D.C. Cir. 1988). The district court so held, the parties have not objected, and, finding no apparent error, we also view Missouri law as controlling. *BWX Electronics, Inc. v. Control Data Corp.*, 929 F.2d

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[3] Before *NEPACCO*, the district court had viewed the term "damages" under Missouri law as including cleanup costs. *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, 654 F. Supp. 1334, 1359 (D.D.C. 1986).

[4] Several other policies were expressly governed by the law of New York. The district court, relying on two New York trial court decisions, held that cleanup costs were included within the term "damages" in those policies.

707, 710 (D.C. Cir. 1991). Missouri's appellate courts, however, have not spoken to the issue before us.[5] The state's highest court had an opportunity to do so when the Third Circuit certified this question to it, but the Missouri Supreme Court found the certification statute (Mo. Ann. Stat. § 477.004 (Vernon Supp. 1990)) to be unconstitutional. *See Jones Truck Lines, Inc. v. Transport Co.*, No. 72650 (Mo. July 13, 1990).

Because Missouri law thus remains unsettled, and because the Eighth Circuit is the "home" circuit for Missouri, the defendant insurers urge us simply to adhere to the *NEPACCO* decision, much as the district court did. One rather obvious consideration favors that course. If our interpretation of Missouri law were at odds with the Eighth Circuit's, only the Supreme Court could resolve the resulting conflict, in the absence of a Missouri appellate court ruling. While the Supreme Court has on occasion reviewed decisions in diversity cases to determine whether a federal appellate court properly applied settled principles in ascertaining state law, *see, e.g., Exxon Co., U.S.A. v. Banque de Paris et des Pays-Bas*, 488 U.S. 920 (1988) (order), such occasions are understandably infrequent. Intercircuit conflicts could be entirely avoided if, after the first federal appellate court ruled, other federal

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[5] The Circuit Court of the City of Saint Louis, in an opinion rendered after the decision here, held that an insurer's obligation to pay "damages" includes reimbursement for environmental clean-up costs incurred by the government. *Cooper Indus., Inc. v. American Mutual Liability Ins. Co.*, No. 864-00284, mem. op. at 36-37 (Mo. Cir. Ct. Sept. 8, 1989). Rejecting the Eighth Circuit's view in *NEPACCO*, the court determined that under Missouri principles of insurance contract interpretation, the word "damages" unambiguously includes clean-up costs sought by the government under CERCLA, 42 U.S.C. § 9607(a). This decision, however, is not controlling on the question of Missouri law because it was not rendered by the state's court of last resort, or an intermediate appellate court. *See Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940).

courts of appeals simply followed that ruling without exercising any independent judgment. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), however, requires federal courts in diversity cases "to determine how the highest court of the state would decide," C. WRIGHT, FEDERAL COURTS 373 (4th ed. 1983); since a state's highest court would not be bound by a federal court decision interpreting state law, one might question whether other federal courts of appeals may be. Another consideration is present when the initial federal decision is that of the home circuit, which may be thought to be experienced in interpreting the particular state's laws, even though the "very essence of *Erie* is that the bases of state law are presumed to be communicable" to any federal judge. *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1225 (1991).

The potential for forum-shopping within the federal judicial system caused by intercircuit conflicts over the meaning of state law, and the assumption of expertise on the part of the home circuit, have led us to conclude that a home circuit's view of state law is entitled to deference. *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 125-26 (D.C. Cir. 1986).[6] *See also Waters v. American Auto.*

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[6] In a diversity case, we stand in the shoes of the court of the forum state, which here is the District of Columbia Court of Appeals. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956). *Erie* had two objectives—"discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). Both aims were accomplished by requiring uniformity between "coordinate state and federal courts sitting side by side." *Klaxon v. Stentor Co.*, 313 U.S. 487, 496 (1941). This may suggest that the extent of our obligation to defer to the Eighth Circuit would depend on what weight the District of Columbia Court of Appeals would give to that court's ruling in the absence of governing Missouri precedent. *See* 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4507, at 112 (1982). But the local courts in the District of Columbia have not spoken to this issue; accordingly there is no indication that they would treat the matter of deference any differently than the rule set forth in our decision in *Abex*.

Ins. Co., 363 F.2d 684, 689 (D.C. Cir. 1966). Deference is one thing; blind adherence quite another. Under *Abex*, we will not follow another circuit's decision if that court "ignored clear signals emanating from the state courts" or "*clearly misread* state law." 790 F.2d at 125-26 (emphasis in original), citing with approval *Factors, Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). While the instances when this has occurred will be "rare" (790 F.2d at 125), we believe the Eighth Circuit's decision in *NEPACCO* falls within the *Abex* exception.

NEPACCO begins with an analysis of Missouri's principles of insurance contract interpretation. The court determined that under Missouri law the language of an insurance policy is to be given "the meaning that would ordinarily be understood by the lay[person] who bought and paid for the policy." *NEPACCO*, 842 F.2d at 985, quoting *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695, 698 (Mo. 1982). On this score, the court was clearly correct. "Meaning of words or terms in an insurance contract is tested by common understanding and speech of men." *Whited v. National Western Life Ins. Co.*, 526 S.W.2d 364, 367 (Mo. App. 1975); *see also Greer v. Zurich Ins. Co.*, 441 S.W.2d 15, 27 (Mo. 1969); *Wehmeier v. State Farm Mut. Auto. Ins. Co.*, 556 S.W.2d 739, 740 (Mo. App. 1977). The court also ruled that under Missouri law if the language is unambiguous, the insurance policy is to be enforced strictly in accordance with its plain and ordinary meaning; if it is ambiguous—that is, "reasonably open to different constructions"—then it should be construed against the insurer. 842 F.2d at 985. Here too the Eighth Circuit was on solid ground. When language is susceptible to more than one plain and ordinary interpretation, "that most favorable to the insured must be adopted." *Krombach v. Mayflower Ins. Co.*, 785 S.W.2d 728, 731 (Mo. App. 1990). A technical meaning that is in conflict with common understanding shall not be applied "unless it plainly appears that the technical

meaning is intended." *Krombach*, 785 S.W.2d at 731; *see also Greer*, 441 S.W.2d at 27.

Our difficulty with *NEPACCO* is that it fails to apply these Missouri law principles. Rather than relying on the common understanding of the word "damages," the court proceeded to analyze how that term is used "by astute insurance specialists or perspicacious counsel" (*Hammontree v. Central Mut. Ins. Co.*, 385 S.W.2d 661, 666 (Mo. App. 1965)). Relying on *Maryland Casualty Co. v. Armco*, 822 F.2d 1348 (4th Cir. 1987), which interpreted "damages" based on "the legal, technical meaning" (*id.* at 1352), the court concluded that "damages" unambiguously refers to compensatory relief but does not include equitable monetary relief. *NEPACCO*, 842 F.2d at 985-86. Law-suits by the government seeking reimbursement or restitution for environmental cleanup costs "are essentially equitable actions for monetary relief" (*id.* at 987). Therefore, the court found such costs to be outside the realm of insurance policies indemnifying for "sums" to be paid "as damages."

As the *NEPACCO* majority itself acknowledged, the lay insured would not distinguish between legal and equitable relief when construing "damages." 842 F.2d at 985. The term broadly refers to "the estimated reparation in money for detriment or injury sustained," or "compensation or satisfaction imposed by law for wrong or injury." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 571 (1981). The Missouri layperson would expect "damages" to encompass all financial liabilities one is obligated to pay as a result of another's loss. At least one Missouri trial court has interpreted "damages" this way in a case involving the same insurance policy language at issue here. *Cooper Indus., Inc. v. American Mutual Liability Ins. Co.*, No. 864-00284, mem. op. at 33 (Mo. Cir. Ct. Sept. 8, 1989). Before Missouri adopted model jury instructions, in decisions concerning the adequacy of trial courts' jury instructions on the issue of damages in negligence actions, Missouri courts defined "damages" as re-

compense or reparation for injury sustained. *See Jackson v. St. Louis-San Francisco R. Co.*, 211 S.W.2d 931, 936 (Mo. 1948); *Lord v. Austin*, 39 S.W.2d 575, 578 (Mo. App. 1931). Under Missouri's model instructions, recovery reflecting the cost of restoring or repairing property is also understood as a form of "damages." *Cf. Jack L. Baker Cos. v. Pasley Mfg. & Distrib. Co.*, 413 S.W.2d 268, 272-73 (Mo. 1967). As the Missouri trial court observed in *Cooper Industries*, these jury instruction cases are significant because Missouri courts "were confronted with the meaning of the term damages as it would be understood by laymen—the jury." *Cooper Industries*, mem. op. at 34-35.

Liability for environmental cleanup costs quite naturally fits this common and ordinary understanding of damages. Missouri and the United States "are not mere contractors who act out of expectation of recompense for their cleanup work." *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 829, 274 Cal. Rptr. 820, 836, 799 P.2d 1253, 1269 (1990). Their out-of-pocket expense in cleaning up the property contaminated by dioxin is a loss or detriment "incurred as a matter of public duty" and constitutes harm to the public fisc. *Id.* Independent Petrochemical's liability compensates for that harm.

Our research reveals that, with the exception of *NEPACCO*, in every case in which the operative state's rules of insurance contract interpretation required—as Missouri's does—resort to the common and ordinary understanding of language, the word "damages" has been construed to cover reimbursement for environmental response costs incurred by a government.[7] These decisions

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[7] *See, e.g., New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162 (3d Cir. 1991); *Avondale Industr., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1207 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2588 (1990); *Jones Truck Lines v. Transport Ins. Co.*, 29 Env't Rep. Cas. (BNA) 1606, 1613 (E.D. Pa. 1989); *Chesapeake Utils. Corp. v. American Home Assurance Co.*, 704 F. Supp. 551,

are discussed in depth by Judge Becker, in his opinion for the court in *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d 1162, 1187-90 (3d Cir. 1991). Decisions construing the term differently were apparently governed by state rules of interpretation under which the technical or legal meanings of language controlled.[8]

Had the record revealed that Independent Petrochemical intended to be bound by the technical meaning of "damages," the common and ordinary understanding of that term would not control. *Krombach*, 785 S.W.2d at 731. But no such evidence was presented. The insurers here simply relied on the argument that "damages" has an unambiguous technical meaning. While that may be true, it misses the point. Technical meaning is the exception rather than the rule in Missouri, and the insurers therefore also had to show that the parties intended to be bound by it. We thus disagree with the Eighth Circuit that the Missouri Supreme Court would not construe "damages" to carry the meaning a layperson would give to it.

We also reject the insurers' argument, adopted in *NEPACCO* (842 F.2d at 986), that the language of CERCLA is against construing the word "damages" to encompass liability for the governments' cleanup costs. It

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559-60 (D. Del. 1989); *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1169-70 (W.D. Mich. 1988); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 75 (E.D. Mich. 1987); *Boeing Co. v. Aetna Casualty & Surety Co.*, 784 P.2d 507, 511-12 (Wash. 1990).

[8] *See, e.g., Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 981 (4th Cir. 1989); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Cedar Chemical Corp. v. American Universal Ins. Co.*, No. 87-2838-4B, mem. op. at 6 (W.D. Tenn. Sept. 13, 1989); *Hayes v. Maryland Casualty Co.*, 688 F. Supp. 1513, 1515 (N.D. Fla. 1988); *Travelers Ins. Co. v. Ross Elec. of Washington, Inc.*, 685 F. Supp. 742, 745 (W.D. Wash. 1988); *Lido Co. of New England v. Fireman's Fund Ins. Co.*, 574 A.2d 299, 301 (Me. 1990); *Braswell v. Faircloth*, 387 S.E.2d 707, 710-11 (S.C. Ct. App. 1989).

is of no consequence that CERCLA lists separately liability for "all costs of removal or remedial action incurred by the United States Government or a State" (42 U.S.C. § 9607(a)(4)(A)), and liability for "damages for injury to, destruction of, or loss of natural resources" (*id.* § 9607(a)(4)(C)). Other sections treat response costs as a subset of damages. CERCLA provides, for example, that the measure of "damages to natural resources" shall "not be limited to the sums which can be used to replace or restore such resources." 42 U.S.C. § 9607(f)(1). Moreover, courts that have interpreted CERCLA do not seem to distingish governmental cleanup costs from "damages." The Supreme Court characterized section 107 as providing "liability in damages," and concluded that CERCLA "hold[s] States liable in damages in federal court." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 12, 13 (1989). Other courts have also identified CERCLA claims for relief as including cleanup costs "or other damages." *See, e.g., Cadillac Fairview/California v. Dow Chemical Co.*, 840 F.2d 691, 693 (9th Cir. 1988); *Gopher Oil Co. v. Union Oil Co. of California*, 757 F. Supp. 988, 997 (D. Minn. 1990); *Commerce Holding Co. v. Buckstone*, 749 F. Supp. 441, 443 (E.D.N.Y. 1990); *Ogden Corp. v. The Travelers Indem. Co.*, 739 F. Supp. 796, 801 (S.D.N.Y. 1989); *Philadelphia v. Stepan Chemical Co.*, 713 F. Supp. 1484, 1486 n.3 (E.D. Pa. 1989). We not only have done the same, but also have stated that restitutionary relief (cost of restoration) is a proper measure of recovery in "resource damages actions." *See Ohio v. U.S. Dep't of Interior*, 880 F.2d 432, 459 (D.C. Cir. 1989).

The insurers also argue that to interpret "damages" to include cleanup costs would make no sense when the clause—"all sums which the insured shall become legally obligated to pay as damages"—is read as a whole. They believe such a reading must be incorrect because it would make the term "damages" all-inclusive; if cleanup costs are "damages," then so are "all sums" a party might have to pay, such as fines, penalties, and attorneys' fees.

The argument, in other words, is that the reference to "damages" would be rendered redundant because it would not limit or qualify the term "all sums."

We can see how an ordinary person might view response costs, but not fines or penalties, as "damages." Liability for environmental response costs is similar to compensation placing an individual in the position that he would have been in had the injurious action not occurred. This is how "damages" is ordinarily understood. A fine or penalty, in contrast, is not understood to be dollar-for-dollar recompense. Rather, it is a pecuniary form of punishment for the commission of an act society finds repugnant and seeks to deter. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 852, 1668 (1981); BLACK'S LAW DICTIONARY 632, 1133 (6th ed. 1990); *see also Gloucester Township v. Maryland Casualty Co.*, 668 F. Supp. 394, 401 (D.N.J. 1987). In regard to attorneys' fees, Missouri law is against the insurers' position. A Missouri appeals court has held that attorneys' fees are "indistinguishable from a damages award for [insurance] coverage purposes" where the operative policy language is the same as in this case. *Hyatt Corp. v. Occidental Fire & Casualty Co. of North Carolina*, 801 S.W. 2d 382, 393 (Mo. Ct. App. 1990).

We therefore hold that under the insurance policies governed by Missouri law, "damages" includes costs the insured is legally obligated to pay to the United States and Missouri as reimbursement for their activities in remedying environmental harm.

II

The remaining question on appeal is whether an insurance policy issued by Pacific Indemnity Company covered Independent Petrochemical, Charter Oil and The Charter Company at the time Bliss sprayed the oil containing dioxin. Pacific Indemnity maintains that the policy expired on January 7, 1971, when Signal Oil and Gas Company sold all of Independent Petrochemical's outstanding stock to Charter Oil Company, six weeks before

Bliss first began removing the dioxin-contaminated material. The district court agreed that the policy expired and therefore granted Pacific's motion for summary judgment. We affirm.

As a preliminary matter, we must decide what law governs our interpretation of the Pacific policy, a question not addressed below. Pacific Indemnity maintains that California law governs. Pacific Indemnity is a California corporation, Pacific and Signal Oil have their principal places of business in California, Signal paid the premiums in California, and Pacific administered the policy there. On the other hand, Missouri law might govern because Missouri is where the insured risk is located. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 (1971). We need not choose between the two, however, because the laws of Missouri and California generally are compatible. *See Muller v. Massachusetts Mut. Life Ins. Co.*, 644 F. Supp. 916, 918 (D.D.C. 1986). Like Missouri law, California law merely requires the terms of the Pacific policy to be construed according to their ordinary meaning. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 274 Cal. Rptr. 820, 799, P.2d 1253 (1990); *Mill Valley* v. *Transamerica Ins. Co.*, 98 Cal. App. 3d 595, 602, 159 Cal. Rptr. 635, 639 (Ct. App. 1st Dist. 1979); *Highlands Ins. Co. v. Universal Underwriters Ins. Co.*, 92 Cal. App. 3d 171, 174-75, 154 Cal. Rptr. 683, 685 (Ct. App. 2d Dist. 1979).

In relevant part, Item 1(A) of the policy defines "named insured" as "the subsidiary and associate companies of 'The Signal Companies' . . . or other company but only as listed in Item 6 of the Declarations . . . ." Item 6 is a listing of companies entitled "Schedule of Subsidiaries/Associates Insured." When read together, Item 1A) and Item 6 express the parties' intention to insure companies that are in some way affiliated with Signal. Item 1(A) speaks of "subsidiary and associate companies," and refers to what is an "at-a-glance" reference list for identifying who those subsidiaries and

associates might be. At the time of the stock transfer from Signal to Charter Oil, Independent Petrochemical lost its status as a subsidiary and therefore no longer fell within the ambit of the Pacific policy.

It is equally clear that continued coverage was not intended to be an automatic consequence of the stock transfer transaction. In Article XXI(a) of their Agreement and Plan of Reorganization, Signal agreed to maintain Independent Petrochemical's coverage "pending the Closing Date." Article XXI(b) provides that "[a]t Charter Oil's request" and "for a reimbursement by Charter Oil of a pro-rata share of premiums paid by Signal," Signal would "use its best efforts to continue coverage . . . after the Closing Date and until expiration of the policy year . . . to the extent permitted by the particular Signal insurance policy." Charter took none of these steps. Instead, it obtained other insurance coverage for Independent Petrochemical effective October 3, 1970, months before the closing date.

* * * *

We affirm the district court's order of February 4, 1986, and its judgment, in favor of Pacific Indemnity "on all claims made by Plaintiffs in this section." For the reasons set forth in part I, we reverse the district court's judgment that the policies governed by Missouri law do not cover environmental cleanup costs, incurred by the state and federal governments, for which the insured is legally obligated.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3347

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Plaintiffs,

v.

AETNA CASUALTY AND SURETY COMPANY, *et al.*,
Defendants.

MEMORANDUM OPINION

[Filed Sep. 7, 1988]

Introduction

This declaratory judgment action has been brought to determine defendant insurers' defense and indemnification obligations to plaintiffs Independent Petrochemical Corporation (IPC), Charter Oil Company (COC) and The Charter Company (TCC). Plaintiffs have been named as defendants in a great number of suits brought as a result of dioxin contamination in Missouri.[1] Both defendants and plaintiffs have filed motions for summary

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[1] For the sake of simplicity, throughout much of this memorandum "plaintiffs" will be used generically to refer to any of the plaintiff organizations. The court notes, however, that it was IPC that was directly engaged in marketing petrochemicals in Missouri in the 1970s.

judgment and partial summary judgment based on various issues involving, for example, the formation and interpretation of policy provisions.[2] The discussion below addresses the various defendants' and plaintiffs' motions together on an issue-by-issue basis. A listing of these issues follows:

(1) Waiver of Defenses ..... p. [19a]
(2) Nondisclosure ..... p. [66a]
(3) Timely Notice ..... p. [78a]
(4) Named Inured ..... p. [100a]
(5) Limits of Liability ..... p. [109a]
(6) Number of Policy Periods ..... p. [117a]
(7) Policies Claimed To Have Expired Before Contamination at Specific Sites p. [123a]
(8) Property Damage Claims From Contamination Before Policies Started ... p. [139a]
(9) Completed Operations ..... p. [146a]
(10) Pollution Exclusion Clause ..... p. [155a]
(11) Punitive Damages ..... p. [175a]
(12) Cleanup Costs ..... p. [196a]

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[2] Certain defendants have requested that final judgment be entered pursuant to Rule 54(b) of the federal rules of civil procedure with regard to the issues decided here. Because of the federal policy against piece-meal appeals, the greater efficiency of having all of the issues in this case considered on appeal together, and the lack of prejudice or injustice to the defendants from this delay, the court will not grant rule 54(b) certification with regard to any of the issues decided here. *See Cullen v. Margiotta*, 618 F.2d 226, 228 (2nd Cir. 1980) (rule 54(b) certification appropriate only where delay would create danger of hardship or injustice); *McSurley v. McClellan*, 697 F.2d 309, 315 (D.C. Cir. 1982) (denial of motion for summary judgment ordinarily not reviewable).

1. WAIVER OF DEFENSES

Plaintiffs move for partial summary judgment declaring that the following defendants have waived the affirmative defenses listed below by failing to assert them within a reasonable time after being notified of the claims underlying this suit:

Insurance Company of North America (INA)

—Failure to Disclose (Fifth Defense)

—Failure to Mitigate (Eleventh Defense)

Aetna Casualty & Surety Company

—Pollution Exclusion (Third Defense)

Hartford Accident & Indemnity Company

—Pollution Exclusion (Seventh Defense)

—Conduct in Disregard of Laws (Fourteenth Defense)

Unigard Mutual Insurance Company

—Misrepresentation of Material Facts (Twelfth Defense)

American Home Assurance Company
Lexington Insurance Company
Insurance Company of the State of Pennsylvania (ISOP)

—Nondisclosure with respect to 1975 policies (Eleventh Defense)

—Pollution Exclusion (September 2, 1986 Letter)

Harbor Insurance Company

—Pollution Exclusion (Ninth Defense)

U. S. Fire Insurance Company

—Fraud (Third Defense)

—Misrepresentation of Material Facts (Fourth Defense).

Plaintiffs allege that defendants were obligated to inform them of any defenses that would prevent coverage as soon as defendants possessed enough information to determine that the defense applied. No later than July 19, 1983, according to plaintiffs, sufficient information to put defendants on notice of each of these defenses was provided to each of the above listed defendants.

Defendants, however, did not notify plaintiffs of any of the above listed defenses before July of 1985. As a result, plaintiffs argue, defendants implicitly waived these defenses and should be barred from asserting them in this litigation. Defendants deny that they have waived these defenses. Primary insurers INA, Aetna and Hartford argue that a waiver must be intentional and cannot result from mere delay in notifying plaintiffs of these defenses. Estoppel is also unjustified according to these defendants because plaintiffs have not made a sufficient showing of reliance or prejudice from this delay. Excess insurers Unigard, American Home, Lexington, ISOP, Harbor, and U.S. Fire contend that they have no duty to notify plaintiffs of their position on coverage until the underlying primary coverage has been exhausted or they are required to provide a defense. Finally, many defendants claim that contrary to plaintiffs' assertions, they did not possess sufficient information to establish the applicability of these defenses following the July 1983 meeting, and so did not raise these defenses until 1985 and 1986, in their answers to plaintiffs' complaint and in answers to interrogatories.

Under rule 56(c) of the federal rules of civil procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In evaluating the factual basis of defendants' motions, the court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512 (1986).

I. *Factual Background*

In 1971 IPC arranged for Russell Bliss, an independent contractor, to dispose of certain waste products for its customer Northeastern Pharmaceutical and Chemical Company (NEPACCO). It is alleged that these waste products contained dioxin, a highly toxic substance. Bliss allegedly mixed the dioxin with other waste oils and sprayed it as a dust suppressant on nonpaved roads and horse arenas in various communities in Missouri. As the toxic effects of the dioxin became apparent, claims were brought against Bliss, NEPACCO, IPC and IPC's corporate parents COC and TCC.

Plaintiffs IPC, COC, and TCC subsequently notified their primary insurers, and in some cases their excess insurers, of these claims. While the insurers' responses varied to some extent, all defendants except Aetna either denied coverage, reserved their right to do so, or otherwise failed to provide plaintiffs with a defense.[3] Plaintiffs consequently secured their own defense counsel, maintaining contact with their primary insurers about coverage.

On June 28, 1983, plaintiffs wrote to all primary and excess insurers inviting them to a meeting on July 19, 1983, at which plaintiffs would "present information regarding the allegations in the [dioxin] Actions and dis-

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[3] Aetna initially agreed to defend plaintiffs, while reserving its rights to disclaim coverage later, against the *Drinkard* claim. This claim was later settled by other insurers on behalf of plaintiffs.

cuss proposed case management and defense plans." [4] All defendant insurers attended except for excess insurer American Home.

At the July 19, 1983 meeting, plaintiffs' presentation included background information on the events from which the underlying dioxin claims arose, and a description of claims filed and anticipated claims. This background included: information about plaintiffs and other entities involved, including Bliss and his activities; the names and locations of identified and potential sites; a description of dioxin and its alleged effects on human health and the environment; and a status report on claims filed as of that date. Information on the history of the dioxin claims included the history of IPC; IPC's relationship to NEPACCO; IPC's relationship with Bliss; and state and federal involvement in the 1970s.

Plaintiffs also proposed a "Standstill Agreement" by which the primary carriers would participate with the plaintiffs in a cooperative arrangement for defending the claims, while reserving their rights to disclaim liability at a later date. The meeting produced no agreement, however, and on November 9, 1983 plaintiffs brought this action. On November 11th, plaintiffs wrote to the excess insurers:

> This action has been filed reluctantly because of our inability to reach a mutually acceptable standstill agreement relating to these cases. Our clients are anxious to resolve these questions and will not actively prosecute this case pending an early meeting to reach such agreement. We would like to continue the spirit of cooperation evidenced at our meeting on July 19, 1983.

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[4] Attachment A to Plaintiffs' Statement of Points and Authorities in Support of Their Waiver Motion, Exhibit 1 ("Plaintiffs' Waiver Motion").

> We have agreed with the primary insurers to meet in Washington D.C., on Thursday, November 17, 1983, to reach an agreement. The meeting will be held at The Charter Company's office at 2550 M Street, N.W., Suite 780, Washington, D.C. We believe it more productive to meet first with the six primary carriers and such excess insurer representatives as the primary insurers believe are appropriate. A second meeting will then be scheduled with all participating, if desired.

No excess insurer defendant was asked to attend the November 17th meeting, nor was a second meeting to involve the excess insurers held. Court proceedings were stayed, at the request of the parties, for most of the period up to June 13, 1985.

During this period, a "Standstill Interim Defense Agreement" was negotiated and finally signed by plaintiffs and the primary insurers, effective February 1984. A reservation of rights provision was included:

> 2. Reservation of Rights—This Interim Agreement does not adopt any specific coverage theory. All parties to this Interim Agreement fully reserve all rights and obligations with regard to all issues of defense and indemnity, whether or not any such party specifically reserves its rights concerning or in relation to each or any of the individual claims or legal actions that form the basis for this Interim Agreement. All parties accept all other parties' reservations of rights; and, except as otherwise specifically provided herein, no waiver or estoppel shall arise as a result of this Interim Agreement, or any delay in its having been undertaken, nor shall any exclusion or other limitation be considered waived. . . .[5]

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[5] Partial Joint Opposition Of Aetna Casualty And Surety Company, Hartford Accident And Indemnity Company And Insurance Company Of North America To Plaintiffs' Motion For Summary

Both plaintiffs and defendants have since filed numerous pleadings, and engaged in discovery, concerning the defenses at issue here. This material will be discussed below, in relation to each specific defendant and defense involved.

II. *Choice of Law Principles*

In determining what law to apply to issues in contract, the court should generally apply the law chosen by the parties unless it is contrary to a fundamental policy of a state with a materially greater interest. *See Restatement (Second) of Conflict of Laws* § 187 (1971). Absent a determination by the parties, the court will apply "the local law of the state which, wtih respect to that issue, has the most significant relationship to the transaction and the parties". *Id.* § 188. The contacts to be considered in determining which state has the most significant relationship include:

> "(a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue."

Id. § 188(2); *See Koro Co, Inc. v. Bristol-Meyers Co.*, 568 F.Supp. 280, 286 (D.D.C. 1983) (citing Restatement).

Judgment Against Certain Defendants With Respect To The Waiver of Defenses, Attachment at 4-5 ("Partial Joint Opposition to Plaintiffs' Waiver Motion).

Where the contract is one for liability insurance, "the state which the parties understood was to be the principal location of the insured risk during the term of the policy" will control the rights created under the policy "unless with respect to the particular issue, some other state has a more significant relationship." *Id.* § 193.

This court has made a number of rulings regarding the law to be applied in this case. In general, the law to be applied to a waiver claim will be the same law that governs the affirmative defense at issue. *See* Memorandum of January 8, 1987 at 11 (waiver issue entwined with defense of nondisclosure).

Because all of the activities giving rise to the underlying dioxin-related claims took place in Missouri, where IPC was operating during the relevant time period 1971-1983, and which is the location of the insured risk involved here, in general the court will evaluate defenses that are rooted in the interpretation of the policies according to Missouri law. *See Independent Petrochemical Corp. v Aetna Casualty & Surety Co.*, 654 F.Supp. 1334, 1356-57 (D.D.C. 1986) (trigger-of-coverage issue strongly connected with the location of the insured risk that parties knew existed when contracts formed; Missouri law governs) (*"IPC v. Aetna"*).

Defenses involving challenges to the formation of the contract ordinarily will be evaluated according to the law of the state in which they were negotiated and formed. *See* Memorandum of January 8, 1987 at 4 (as state in which negotiation and formation of contract occurred, Florida has most substantial interest in having its law govern nondisclosure defense).

Defenses relating to either the formation or the interpretation of the policies that designate New York law will be evaluated under New York law. New York law will control the application of these policies unless there is a fundamental conflict between New York law and that of Missouri. *See IPC v. Aetna*, 654 F.Supp. at 1357

(choice-of-law provisions will be given effect unless in fundamental conflict with Missouri law). For each of the defenses plaintiffs allege have been waived, the court will review the law of the relevant jurisdiction with regard to notice and waiver of defenses. Formation defenses will be considered first, followed by defenses based on interpretation of the policy.

III. *Formation Issues*

Plaintiffs assert that if a choice of law analysis is necessary, that Florida law should govern those defenses involving the formation of the policies and the waiver of those defenses. These defenses would include: (A) primary insurer INA's failure-to-disclose defense,[6] (B) excess insurer Unigard's misrepresentation of material facts defense; (C) excess insurers American Home, Lexington & ISOP's nondisclosure with respect to 1975 policies defenses; and (D) U.S. Fire's fraud and misrepresentation of material facts defenses.

American Home, Lexington & ISOP "contend that the Court need not engage in a choice of law analysis with respect to the waiver issue since there is no conflict between Missouri and Florida law on the facets of that issue which are dispositive here." Instead, defendants suggest that the court should decide this case according to "uniform state law."

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[6] This court has already ruled that Florida law controls INA's defense of nondisclosure and its waiver. Memorandum of January 8, 1987, at 3-5 ("Florida, the state in which negotiation and formation occurred, has the most substantial interest in seeing its laws applied to the conduct of parties negotiating for insurance in its jurisdiction.") and at 11 ("Because the question of waiver is so entwined with the issue of nondisclosure, and because Florida has such a strong interest in that issue, *see supra*, § II A, [discussing choice of law for nondisclosure issue] Florida law must apply to the question of waiver as well.").

The court disagrees. There are important differences between the laws of Missouri and Florida that make it impossible for the court to decide these issues under any concept of "uniform state law." Florida has statutory law relevant to these issues that has no comparable counterpart in Missouri law—specifically, Fla. Stat. § 627.409 (1981), which plaintiffs argue bars defendants from asserting this defense.

The court has already ruled that "the issue of nondisclosure in negotiating and forming a contract is appropriately resolved according to the law of the state in which negotiations took place and the contract was formed." Memorandum of January 8, 1987 at 4. The court found that INA's policies were negotiated and formed in Florida and that Florida law would govern its defense of nondisclosure. *Id.* Defendants American Home, Lexington, ISOP, Unigard and U.S. Fire have not contested plaintiffs' assertion that their policies were formed in Florida. Although many of the contacts leading up to the policies' formation were between brokers, the instructions for coverage and final approval came from Jacksonville, Florida, headquarters of COC and TCC.

The court concludes that Florida has the most substantial interest in having its law applied to the "formation" issue of nondisclosure under the policies of American Home, Lexington, ISOP, Unigard and U.S. Fire. U.S. Fire's policies incorporate language from underlying policies which specifically state, however, that they "shall be construed and in force in accordance with and governed by the internal law of the state of New York." [7]

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[7] *See, e.g.*, Plaintiffs' Appendix Of Policy Provisions Relied Upon In Plaintiffs' Statement Of Points And Authorities In Opposition To Defendants' Seven Motions For Partial Summary Judgment On The Punitive-Damages Issue, And Plaintiffs' Rule 108(h) Statement In Support Thereof, Tab 8 (CIRCL policy number CHAF 821) ("Plaintiffs' Appendix of Policy Provisions on Punitive Damages Issue").

The application of New York law to U.S. Fire's nondisclosure defense and waiver issues will be discussed following an analysis of the issues that are to be decided by Florida law: the defense of nondisclosure and its waiver under the policies of INA, American Home, Lexington, ISOP and Unigard.

A. *INA's Defense of Nondisclosure*

As defendants argue that the obligations of a carrier under an excess insurance policy are different from its obligations as a primary insurer, the court will first discuss INA's position as a primary insurer of plaintiffs and then as a carrier of plaintiffs' excess insurance. INA is the only insurer with both types of policies at issue here.

a. *Primary Insurance Policies*

Under Florida common law, if an insurer intends to assert a defense to its liability on a policy, the insurer should inform the insured of that defense as soon as practicable after the basis of the defense is known. *Tiedtke v. Fidelity & Casualty Co. of New York*, 222 So.2d 206, 209 (Fla. 1969); *Bergh v. Canadian Universal Insurance Co.*, 216 So.2d 436, 441 (Fla. 1968). Moreover, a Florida statute requires that an insurer comply with specific notice requirements in responding to an insured's claim, or risk losing the right to assert that defense.

Fla. Stat. § 627.426(2) states that:

> (2) A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless:
>
> (a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by

registered or certified mail sent to the last known address of the insured or by hand delivery; and

(b) Within 60 days of compliance with paragraph (a) or receipt of a summons and complaint naming the insured as a defendant, whichever is later, but in no case later than 30 days before trial, insurer:

1. Gives written notice to the named insured by registered or certified mail of its refusal to defend the insured;

2. Obtains from the insured a nonwaiver agreement following full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted and the duties, obligations, and liabilities of the insurer during and following the pendency of the subject litigation; or

3. Retains independent counsel which is mutually agreeable to the parties . . .

See Auto Owners Insurance Co. v. Salvia, 472 So.2d 486, 488 (Fla. Dist. Ct. App. 1985) (holding insured's lack of cooperation would not excuse insurer from strict compliance with one of three available options under § 627.426(2)(b).

Plaintiffs have moved for summary judgment declaring that INA has waived its defense of nondisclosure by not complying with these requirements of Florida law. In its July 23, 1985 Answer, INA asserts that in applying for insurance policies for the period 1980-1982, plaintiffs failed to disclose information about the first series of dioxin-related claims that had been filed against them. Plaintiffs assert that information about these claims was provided on July 19, 1983 at a major presentation made by plaintiffs to all defendants except one.[8] At this meet-

[8] American Home, although invited to attend the presentation, chose not to send a representative.

ing, plaintiffs notified defendants of all claims that had been filed to date, including the claims on which INA now bases its nondisclosure defense. Two years later, when answering the complaint in this case, INA advised plaintiffs of its intention to assert this defense.

The court previously addressed the issue of INA's waiver of its nondisclosure defense in its January 8, 1987 Memorandum. Plaintiffs had argued that INA waived its nondisclosure defense by not asserting it shortly after receiving a December 16, 1982 letter from plaintiffs notifying it of Bliss' activities and the existence of lawsuits filed by individuals and horse stables against IPC and Bliss. The court found that the "sketchy one-paragraph summary of a pre-1980 dioxin-related litigation contained in the December, 1982, letter" was insufficient to show as a matter of law that INA had the requisite knowledge to trigger the notice requirements of the Florida statute. Memorandum of January 8, 1987 at 12-13.

Unlike the December 16, 1982 letter, however, which the court noted "gives no dates or specific underlying facts about those lawsuits," the July 19, 1983 meeting contained presentations specifically intended to describe the history and status of the first series of claims, whose earlier nondisclosure is the basis of INA's statutory nondisclosure defense.

Florida statute § 627.409(1) states that an insured's failure to disclose information material to insurer's decision to insure, in response to a request for that information, bars recovery on the policy. *See Memorandum* of Jan. 8, 1987 at 6. *Continental Assurance Co. v. Carroll*, 485 So.2d 406, 409 (Fla. 1986). Where the undisclosed information was never requested, however, the statute does not apply. *Roess v. St. Paul Fire and Marine Insurance Co.*, 383 F.Supp. 1231, 1236 (M.D. Fla. 1974).

Absent an insurer's request, the common law defense of intentional material nondisclosure, or fraud, is available. *See id.* at 1237 ("where no inquiry is made about matters alleged to have been concealed, the insurer may avoid the policy only by proving that the concealment was in fact material and, further, that the withholding of such information was intentional and fraudulent").

INA claims that plaintiffs failed to disclose information on the dioxin-related claims filed in the five years before plaintiff entered into negotiations for coverage from INA. These claims have come to be known as the "first series of claims."

Plaintiffs assert that "the history and status of the first series of claims" was presented as part of a "detailed explanation of the history of the Missouri dioxin claims," as well as a part of a separate "detailed description of the first series of cases." Plaintiffs add that INA was informed of the dates on which these claims were filed by an attachment to the June 28, 1983 letter that invited INA to the July 19, 1983 meeting.[9]

INA does not deny that this information on the first series of claims was presented at the July 29, 1983 meeting. Instead, INA argues that its nondisclosure defense is based on a fact that it learned in discovery: that while plaintiffs were applying for insurance during 1980-82, they were also pursuing indemnification from various insurers for one or more of the claims within this first series filed during the 1975-79 period. This fact, INA contends, refutes plaintiffs' explanation that the first series of claims had not been disclosed to INA because they had been assigned to policy years prior to 1975-79.

INA did not need this information, however, to establish a *prima facie* nondisclosure defense under the Florida statute because no showing of fraud or the intent to conceal is required. *See Carroll*, 485 So.2d at 409.

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[9] Attachment A to Plaintiffs' Waiver Motion, Exhibit 1.

INA's common law defense of intentional nondisclosure or fraud requires this additional element of intent. Plaintiffs have not suggested that they revealed any information at the July 19th meeting that would have put INA on notice of the applicability of this common law defense. The court concludes, therefore, (1) that the July 19, 1983 meeting provided INA with sufficient basis to assert a statutory nondisclosure defense but (2) that plaintiffs have not shown that they are entitled to a judgment barring INA from asserting its common-law intentional nondisclosure or fraud defense.

INA, along with other defendants, argue that the information presented by plaintiffs at the July 19, 1983 meeting cannot form the basis of a waiver of rights by INA or these other defendants. This conclusion, they assert, is compelled by the public policy favoring settlement embodied in federal rule of evidence 408. Rule 408 states, in part, that "Evidence of conduct or statements made in compromise negotiations is [] not admissible." Fed. R. Evid. 408.

Plaintiffs counter that Rule 408's prohibitions are limited to situations in which settlement discussions are used to prove liability, not where factual information presented during such discussions negates a claim of ignorance or lack of notice. *See Breuer Elec. Mfg. Co. v. Toronado Systems of America, Inc.*, 687 F.2d 182, 185 (1982) (concluding " 'settlement' evidence was properly presented below to rebut defendants' assertion that they had not been aware of the issues until the suit was filed"; *Council for the National Register of Health Service Providers in Psychology v. American Home Assurance Co.*, 632 F.Supp. 144, 146 n.1 (D.D.C. 1985) (allowing evidence relating to settlement negotiations to negate claims of bad faith on the part of the insurer); *NAACP Legal Defense and Education, Inc. v. United States Dep't of Justice*, 612 F.Supp. 1143, 1146 (D.D.C. 1985) (concluding Rule 408 limits admission of settle-

ment negotiation evidence only where used to prove liability at trial; doesn't form basis for broad FOIA discovery privilege). The court agrees with plaintiffs.

INA, along with other primary insurer defendants, argues further that the Interim Agreement they entered into with plaintiffs contains a reservation of rights provision that specifically precludes plaintiffs' waiver argument. This provision, quoted at length above,[10] includes the statement "except as otherwise specifically provided herein, no waiver or estoppel shall arise as a result of this Interim Agreement, or any delay in its having been undertaken, nor shall any exclusion or other limitation be considered waived."

Plaintiffs argue that this language does not act retroactively to cure a waiver that had occurred during the six to seven month period between the July 19, 1983 meeting and the effective date of the agreement, February 1, 1984. They note that the Agreement is titled a "Standstill" agreement.

Defendant INA emphasizes the provision's specific statement that no waiver or estoppel should result from any delay in reaching this agreement. INA contrasts this language in the agreed-to version with an earlier proposal by plaintiffs that was not accepted, which would have reserved "the rights and obligations of the parties as of the date of this Agreement."[11] The clear implication, under INA's reading, is that in this agreement plaintiffs agreed to forego their right to the claims of waiver and estoppel at issue here.

The Court concludes that this reservation of rights provision does not prevent Florida statute § 627.426(2) from barring INA's statutory nondisclosure defense where INA's failure to satisfy the statute's requirements did not result from the time delay in reaching the Interim Agreement.

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[10] *See supra* part I ("Factual Background").

[11] Attachment A to Plaintiffs' Waiver Motion, Exhibit 3.

The Florida statute § 627.426(2)(b) may be satisfied, as one of three options, where the insurer "[o]btain[s] [] from the insured a nonwaiver agreement following full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted . . . ." Fla. Stat. § 627.426(2)(b)(2). Under the circumstances of this case, this procedure, like any of the three options, must be carried out no later than 90 days from the time the insurer knew or should have known of the coverage defense.

The Interim Defense Agreement became effective February, 1984, approximately six months after INA was provided the information necessary for it to determine the existence of a statutory nondisclosure defense. That nonwaiver agreement, however, was not preceded by INA's full disclosure of the facts and policy provisions upon which it intended to base its nondisclosure defense. That defense itself was not disclosed until July, 1985. Because of its failure to fully inform plaintiffs of its defenses before obtaining the reservation of rights/nonwaiver agreement, INA has not satisfied this statutory requirement.

Nor has INA complied with the terms of the other two options available under § 627.426(2). One of these options allows an insurer to retain "independent counsel which is mutually agreeable to the parties." Fla. Stat. § 627.426(2)(b)(3). The Interim Agreement clearly indicates that defense counsel is not independent. Under the agreement, defense counsel is appointed by and consults with a Management Committee made up of representatives of plaintiffs and their insurers, including INA. Management Committee decisions, moreover, are generally decided by majority vote, with ties being decided in favor of the majority view of the insurer's representatives.[12]

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[12] Appendix to Partial Joint Opposition of Aetna Casualty and Surety Company, Hartford Accident and Indemnity Company and

A final option allows the insurer to give written notice of its refusal to defend. Fla. Stat. § 627.426(b)(2)(1). INA did refuse to defend plaintiffs by letter of April 29, 1983.[13] This notice, however, did not assert the nondisclosure defense as a basis for denying coverage. As a prerequisite to properly denying coverage under the statute, the insurer must first provide written notice of a reservation of rights to assert *that* defense. The need for specificity is fairly discernible from the statute's language regarding subdivision (a):

> (2) A liability insurer shall not be permitted to deny coverage based on a *particular* coverage defense unless:
>
> > (a) Within 30 days . . . written notice of reservation of rights to assert a coverage defense is given . . .

Florida Stat. § 627.426(2) (emphasis added). Subsequent to its denial of coverage, moreover, INA effectively revoked that denial and assumed a role in the defense by entering into the Interim Agreement. Only much later, in July of 1985, did INA provide written notice of its intent to assert a defense of nondisclosure.

This discussion makes clear, then, that primary insurer INA has failed to satisfy the statute's requirements under any of the three options. This failure is not due to any delay in undertaking the Interim Agreement but results from the lack of specific notice of the nondisclosure defense in that agreement or any other INA communications with plaintiffs prior to July 23, 1985. The statutory prohibition that a liability insurer shall

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Insurance Company of North America to Plaintiffs' Motion for Summary Judgment against Certain Defendants with Respect to the Waiver of Defenses at 6 (Standstill Interim Defense Agreement).

[13] Attachment A to Plaintiffs' Waiver Motion, Exhibit 8.

not be permitted to deny coverage based on a particular coverage defense unless the statutory requirements are satisfied, cannot be avoided by the nonwaiver provision of the Interim Agreement.

INA argues that plaintiffs have shown no actual prejudice or detrimental reliance to justify applying the equitable doctrine of waiver to its defenses. Plaintiffs' motion, however, is not based on general equitable principles but is grounded in a statute which contains no explicit reference to the need for prejudice before its sanctions will be triggered.

The legislature's decision to set up several alternative procedures that meet the statute's notice requirements, and to establish specific time periods in which to satisfy them, suggests that it is complete and includes no such implied condition. *Cf. Salvia*, 472 So.2d at 488 (requiring strict compliance with time limits of § 627.426(2)(b)(3) because statute gave insurer two other ways to satisfy requirements of subdivision (b)). INA has suggested no reason that such a condition should be read into the statute. Absent some reason to believe that the legislature intended prejudicial reliance to be an implied condition to the statute, the court will not read such a requirement into it.

The court concludes that no material issue of fact exists as to INA's knowledge of the existence and history of the so-called "first series" of claims, as of the July 19, 1983 meeting. The information, the court finds, is sufficient to establish that INA knew or should have known of the existence of its statutory nondisclosure defense on or shortly after that July 19, 1983 meeting. The parties do not dispute that INA first raised that defense in its Answer to Plaintiff's First Amended Complaint, on July 23, 1985. The court concludes, as a matter of law, that Florida statute § 627.426(2), bars INA from denying coverage under its primary insurance policies on the basis of this statutory nondisclosure defense.

Plaintiffs' motion for summary judgment to this effect is granted.

b. *Excess Insurance Policies*

In addition to its primary insurance policies, INA also provided excess insurance coverage to plaintiffs. The court's analysis of plaintiffs' waiver argument varies in several respects as applied to these excess policies. The INA excess policies follow the form of the Corporate Insurance & Reinsurance Company Limited (CIRCL) First Excess Casualty Policies, which state that "this Agreement shall be construed and *in force* in accordance with and governed by the internal law of the State of New York." (emphasis added.) This contractual choice of law will be honored by the court unless it is in fundamental conflict with the law of Florida, which the court has found otherwise would have the most substantial interest. *See IPC v. Aetna*, 654 F.Supp. at 1357 (contractual choice of New York law applies because not in fundamental conflict with law of Missouri); *Restatement (Second) of Conflict of Laws*, § 187 (1971) (law of state chosen by parties may not apply where "contrary to a fundamental policy of a state which has a materially greater interest").

Both Florida and New York have statutes requiring insurers to notify insureds promptly of any basis they intend to assert in denying coverage.

The New York statute, N.Y. Ins. Law § 3420(d) (McKinney 1985) (formerly § 167(b)) states in pertinent part:

> If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible

> of such disclaimer or liability or denial of coverage to the insured and the injured person or any other claimant.

The statute applies to comprehensive general liability policies as well as automobile policies. *See Kutsher's Country Club Corp. v. Lincoln Insurance Co.*, 119 Misc. 2d 889, 465 N.Y.S.2d 136, (N.Y. Sup. Ct. 1983). If notice of a coverage defense is not given within a reasonable period of time, the insurer will not be allowed to assert it in seeking to avoid liability. *Hartford Insurance Co. v. County of Nassau*, 46 N.Y.2d 1028, 389 N.E. 2d 1061, 1062, 416 N.Y.S.2d 39 (1979).

The Florida statute similarly requires that "A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless" (1) it gives its insured "written notice of reservation of rights to assert a coverage defense" within 30 days after it knew or should have known of the defense, and (2) within the next 60 days either (a) gives written notice of its refusal to defend the insurer; (b) obtains a nonwaiver agreement after full disclosure of the factual and policy grounds of the coverage defense asserted, as well the insurer's duties, obligations and liabilities both during and following the litigation; or (c) retains independent counsel agreeable to both parties. Fla. Stat. § 627.426(2). *See Auto Owners Insurance Co. v. Salvia*, 472 So.2d at 488.

The manner in which these statutes apply to excess insurers is in question here. As the discussion that follows will explain, the court finds no fundamental conflict between New York and Florida law on this issue.

It is settled law in New York that the notice statute applies to excess insurers as well as to primary insurers. *Zappone v. Home Insurance Co.*, 55 N.Y.2d 131, 432 N.E. 2d 783, 447 N.Y.S.2d 911, 913 (1982) (citing *Preisch v. Continental Casualty Co.*, 55 A.D.2d 117, 389 N.Y.S.2d

700 (N.Y. App. Div. 1976) *mot. for lv. to app. den.*, 41 N.Y.2d 802, 362 N.E.2d 626, 393 N.Y.S.2d 1026 (1977). An excess insurer's responsibilities under that statute are not triggered, however, merely by the insurer's knowledge of a claim and its defenses.

As a general matter, an excess insurer has no obligation to defend or indemnify its insured until the primary insurer's coverage has been exhausted. Thus, New York courts have held that an excess insurer's obligations under the notice statute begin only at that time. *See Allcity Insurance Co. v. Sioukas*, 51 A.D.2d 525, 378 N.Y.2d 711, 712 (N.Y. App. Div. 1976) ("since it did not have a policy affording coverage to the respondent until the primary coverage had been exhausted, it had no duty to serve a notice of disclaimer"), *aff'd on mem. below*, 41 N.Y.2d 872, 362 N.E.2d 623, 393 N.Y.S.2d 993 (1977); *Zappone v. Home Insurance Co.*, 447 N.Y.S.2d at 915-16 & n.1 (citing *Preisch v. Continental Casualty Co.* as "holding that a duty arises to give notice once the primary carrier has fulfilled its obligation"). Since the primary insurers' coverage has not been exhausted, as an excess insurer, INA is not yet subject to the requirements or the consequences of the notice statute. This conclusion is fully consistent with Florida law, as interpreted below in the court's analysis of the Nondisclosure Defense of American Home, Lexington & ISOP.

The court concludes that, even though INA was or should have been aware of its statutory nondisclosure defense with regard to its excess policies as much as its primary policies, INA's excess policies suffer no loss of defenses under Fla. Stat. § 27.426(2) because their notice obligations had not yet begun. Plaintiffs' motion for summary judgment barring INA from defending against coverage under its excess policies on grounds of nondisclosure is denied.

B. *American Home, Lexington & ISOP Nondisclosure Defense*

In February 1986 defendants American Home, Lexington and ISOP sought leave to file an Amended Answer,[14] including in that pleading a defense of nondisclosure. This nondisclosure defense was raised for the first time in the Joint Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed on September 16, 1985. In their answers to interrogatories, dated June, 1986, these three defendants cite as grounds for this defense that even plaintiffs "knew as early as 1974 that Russell Martin Bliss had sprayed numerous horse arenas and roads in Missouri with waste oil which contained dioxin," plaintiffs had failed to disclose this information when applying to purchase their 1975 policies from these defendants.[15]

Plaintiffs contend that by waiting until 1985 to assert this defense, when they knew the essential facts underlying it in 1983, these defendants have not complied with the notice requirements of Fla. Stat. § 627.426(2) and so have waived their right to contest liability on this ground. American Home, Lexington and ISOP assert that the time requirements of the Florida statute should not begin to run against them, as excess insurers, until the underlying primary coverage has been exhausted. As this has not yet happened, under defendants' interpretation the statute's requirements would not yet have been triggered with regard to them.

The court agrees with defendants. Although no Florida state court has yet addressed the issue, the central purpose of the statute and the principles of established Florida common law convince this court that the statute's

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[14] The Amended Answer was filed on May 19, 1986.

[15] Attachment J to Plaintiffs' Waiver Motion at 21 (American Home); Attachment K at 17 (ISOP); Attachment L at 18 (Lexington).

notice requirements are not triggered with respect to excess insurers until the underlying primary coverage has been exhausted.

The United States District Court for the Southern District of Florida recently examined this issue, reaching a similar conclusion. *See Pepper's Steel & Alloys, Inc., v. United States Fidelity and Guaranty Co.*, 668 F.Supp. 1541, 1543-44 (S.D. Fla. 1987). In that case as well as here, the plaintiffs sought a defense from their primary insurers, conceding that their excess insurers had no duty to defend. The court, therefore, found the statute inapplicable to excess insurers because it "is designed to address problems arising from disputes regarding whether, how and under what circumstances and conditions a defense will be provided for an insured pursuant to a defense provision of an insurance contract." *Id.* at 1544.

Under this interpretation, the statute would operate consistently with established principles of Florida common law estoppel. In general, an insured "claiming estoppel because of a delay in disclaiming liability must show that its rights were prejudiced thereby." *Phoenix Assurance Co. of New York v. Hendry Corp.*, 267 So.2d 92, 94 (Fla. Dist. Ct. App. 1972) *cert. dismissed*, 277 So.2d 532 (Fla. 1973); *Centennial Insurance Co. v. Tom Gustafson Industries, Inc.*, 401 So.2d 1143, 1144 (Fla. Dist. Ct. App. 1981), *petition for rev. denied*, 412 So.2d 471 (Fla. 1982). Because an insured ordinarily does not rely on an excess insurer for its defense, at least until the primary coverage is exhausted, it would not be prejudiced by delay in the excess insurer's assertion of coverage defenses.

It is true of course, that as an enactment of the Florida legislature, section 627.426(2) is not necessarily bound to common law precedents. *Cf. Auto Owners Insurance Co. v. Salvia*, 472 So.2d at 488 (requiring strict compliance with statute). This fact, however, does not

require the court to apply the statute in disregard of long established principles of Florida insurance law.

Plaintiffs would have the court read the statute's notice obligations as applying to excess insurers exactly as they would be applied to primary insurers. Plaintiffs concede, however, that its excess insurers have no present duty to defend. Nor do excess insurers have any contractual obligation to indemnify plaintiffs until the underlying primary coverage has been exhausted. *Metropolitan Property and Life Insurance Co. v. Chicago Insurance Co.*, 479 So.2d 114, 116 (Fla. 1985) (primary policy must be exhausted before excess policy can be reached); *Gulf Insurance Corp. v. Continental Casualty Co.*, 464 So.2d 207, 210 (Fla. Dist. Ct. App. 1985) (excess insurer's policy "not invoked" when claim settled within primary coverage limits).

It seems unlikely that the Florida legislature intended to impose notice requirements on excess insurers that have no relation to their contractual obligations to defend or indemnify insureds. Unlike the court in *Pepper's Steel & Alloys*, however, this court does not consider the statute wholly inapplicable to excess insurers. Instead, the court understands an excess insurer's obligations under the statute to be triggered at the same time its contractual obligation to defend is activated.

Plaintiffs seek to limit the applicability of *Pepper's Steel* by arguing that its holding was restricted to subsection (2)(b) of the statute and that defendants are still bound under subsection (2)(a) to supply a written reservation of rights to assert a defense, within 30 days of the time they knew or should have known of that defense. The court, however, finds the reasoning of *Pepper's Steel* to apply to the notice requirements of both subsections as the court understands this statute to be an integrated statement of an insured's notice responsibilities, once they are triggered.

The Court of Appeals of New York State, which has a comparable statute,[16] has construed its obligations on excess insurers in a similar manner. *See Zappone v. Home Insurance Co.*, 55 N.Y.2d 131, 432 N.E.2d 783, 447 N.Y.S.2d 911, 915-16 (1982) ("since an excess carrier 'did not have a policy affording coverage to the respondent until the primary coverage had been exhausted, it had no duty to serve a notice of disclaimer;'" quoting with approval *Allcity Insurance Co. v. Sioukas*, 51 A.D. 525, 378 N.Y.S.2d 711, 712 (N.Y. App. Div. 1976), *aff'd* 41 N.Y.2d 872, 362 N.E.2d 623, 393 N.Y.2d 993 (1977)).

The court finds that these excess insurer defendants' obligations under the Florida statute have not yet been triggered and concludes that as a matter of law that plaintiffs are not entitled to a judgment barring defendants American Home, Lexington and ISOP from asserting their nondisclosure defense.

C. *Unigard Misrepresentation of Material Fact Defense*

In its Answer of July 23, 1985, Unigard contends that plaintiffs' rights under its excess insurance policy for 1973 "are unenforceable due to breach of warranty, mistake, misrepresentation and/or omission of material facts by plaintiffs . . . ."[17] Plaintiffs contend that Unigard waived its misrepresentation of material fact defense by failing to assert that defense within the time period required under the Florida statute. Unigard acknowledges that it learned in mid-1983 the information it alleges was improperly omitted or misrepresented and which forms the basis of this defense: (1) that IPC knew in 1974 that IPC was being sued as a result of Bliss' activities and (2) that the Center for Disease Control was investi-

[16] N.Y. Ins. Law Art. 34 § 3420(d) requires insurers to "give written notice as soon as is reasonably possible of [a] disclaimer of liability or denial of coverage" or lose the right to assert that defense to liability.

[17] Attachment B to Plaintiffs' Waiver Motion.

gating dioxin contamination resulting from Bliss' activities.[18] This information then, clearly was adequate to have allowed Unigard to assert a statutory nondisclosure defense under Florida law in 1983.

Even if defendants had sufficient information to have notified plaintiffs earlier, this court has held that excess insurers' obligations under the Florida statute are not triggered until primary coverage has been exhausted. As this has not yet occurred, Unigard has not breached the statute's requirements. Plaintiffs are not entitled, as a matter of law, to a judgment barring excess insurer Unigard from asserting its misrepresentation-of-material-fact defense.

D. *U.S. Fire Misrepresentation and Fraud Defenses*

Earlier in this case, the court stated that contracted for choice-of-law provisions would be given effect unless the law of the state chosen was in fundamental conflict with the law of the state that otherwise has the most substantial interest. *See IPC v. Aetna*, 654 F.Supp. at 1357 (New York law applies because not in fundamental conflict with Missouri law). The U.S. Fire policies follow the form of the CIRCL policies which state that "this Agreement shall be construed and in force in accordance with and governed by the internal law of the state of New York."

In its Memorandum of January 8, 1987, the court determined that Florida has the most substantial interest in having its law applied to INA's defense of nondisclosure and its waiver. The court finds that, if it were not for the parties' choice of New York law, Florida's interests would also be predominant regarding U.S. Fire's misrepresentation and fraud defenses. For U.S. Fire's defenses, just as for INA's defense of nondisclosure, "the place of contracting and the place of negotiation of the contract emerge

[18] Attachment G to Plaintiffs' Waiver Motion at 12-13.

as far more significant than the place of performance, location of the subject matter of the contract, or place of business of the parties." *Id.* at 4 (citations omitted). As in the case of INA's dealing with Charter, the negotiations leading up to the issuing of the policies took place largely in Florida and the policies were issued to plaintiffs there.

U.S. Fire agrees with this analysis and that New York law regarding waiver, as applied to the defenses of misrepresentation and fraud, is not contrary to a fundamental policy of Florida law. Plaintiffs suggest that Florida law should control but acknowledges that New York law will apply if the court finds that express choice of law provisions govern. New York and Florida each have a statute that requires insurers to notify their insureds promptly if they intend to deny coverage under their policies. The application of each of these statutes to excess insurers has been discussed earlier by the court. The court determined that the obligations of both the Florida and New York statutes do not apply to excess carriers until the underlying primary coverage has been exhausted and that New York law posed no conflict with any fundamental policy of Florida law.[19]

U.S. Fire did not assert its defenses of "fraud and/or false swearing" and "concealment and/or misrepresentation" until July 22, 1985, when it filed its Answer to First Amended Complaint. Plaintiffs now contend that it should be barred from asserting those defenses because it knew all of the information necessary to asserting the defense no later than the July 1983 meeting. In addition to denying that it possessed sufficient information to assert its fraud and misrepresentation defenses in 1983, U.S. Fire asserts several other reasons why it is not required to have notified plaintiffs of its intent to deny

[19] *See supra* parts III.A.b (INA Nondisclosure Defense—Excess Policies), and III.B (American Home, Lexington & ISOP Nondisclosure Defense).

coverage. Among other reasons, U.S. Fire contends that its delay in asserting defenses is reasonable under the circumstances of this case, especially because as an excess insurer, U.S. Fire is not required to notify plaintiffs of its coverage position until the primary coverage has been exhausted.

The court concludes that it is not necessary to determine whether plaintiffs have shown that U.S. Fire had sufficient information to assert its fraud and misrepresentation defenses in 1983. The analysis of the New York statute's application to excess insurers, offered earlier with regard to INA's obligations as an excess insurer, clearly indicates that U.S. Fire similarly is not barred under that statute from asserting these defenses. The court concludes therefore that even if plaintiffs are able to show that U.S. Fire had sufficient knowledge to notify them of its fraud and misrepresentation defenses, plaintiffs are not entitled—as a matter of New York law—to a judgment barring U.S. Fire from asserting these defenses.

IV. *Contract Interpretation Issues*

In an earlier decision in this case, the court concluded that the contract issue of the appropriate trigger-of-coverage under the policies is governed by Missouri law. *IPC v. Aetna*, 654 F.Supp. at 1356-57. In determining the principal location of the insured risk, the court noted that although two of the plaintiffs were located in Florida, "it is even more significant that all defendants knew that Florida plaintiffs [COC and TCC] were holding companies of plaintiff IPC and that IPC was engaged in terminaling and marketing various petrochemical products in Missouri." *Id.* at 1357. The court found the trigger-of-coverage issue to be "strongly connected with the location of the insured risk," as it "speaks to whether defendants are liable for indemnification to plaintiffs when injury or property damage is shown in the underlying dioxin-related suits." *Id.*

Based on the court's prior rulings in this case, plaintiffs contend that Missouri law should control issues of waiver regarding interpretation of the insurance policies. These include: (A) INA's Mitigation Defense, (B) Aetna's Pollution Exclusion Defense, (C) Hartford's Pollution Exclusion Defense, (D) Hartford's Conduct in Disregard of Law Defense, (E) American Home, Lexington & ISOP's Pollution Exclusion Defense, and (F) Harbor's Pollution Exclusion Defense. All of these defenses center on the issue of defendants' liability to indemnify plaintiffs on the underlying claims. They are all, therefore, strongly connected to Missouri—the location of the insured risk and the damages resulting from Bliss' activities. Defendants do not dispute plaintiffs' reasoning. These choice of law principles are applied to each issue below.

A. *INA Mitigation Defense*

INA has asserted as a defense that plaintiffs failed to mitigate damages resulting from dioxin spraying in Missouri. This defense addresses the activities and omissions of plaintiffs to minimize damage in Missouri from dioxin to the land of that state. This defense then, has a very strong connection to Missouri as the location of the insured risk and is properly decided according to Missouri law.

In its July 23, 1985 Answer, INA claims that even after learning that Bliss had sprayed dioxin as a dust suppressant on roads and horse stables in Missouri, plaintiffs failed to mitigate, minimize or avoid damages from resulting dioxin claims. Plaintiffs assert that adequate information was provided at the July 19, 1983 meeting concerning governmental investigations and detection of the dioxin, the resulting claims, and plaintiff's defense team, that INA should have known of the existence of a basis for a failure-to-mitigate defense. Because it knew of and did not assert this defense, plaintiffs argue, INA has waived its right to assert it as a ground for avoiding liability on the underlying claims.

INA argues that plaintiffs have not shown that the July 1983 meeting revealed that plaintiffs had known, *in the 1970's*, of Bliss' spraying dioxin-contaminated waste oil as a dust suppressant and the presence of dioxin in this land posed severe risks to persons and property. INA implies that this information was learned only through discovery in this case. Although their detailed listing of matters discussed at the July 1983 meeting suggests otherwise, plaintiffs have not specifically asserted that in fact they communicated the facts of their knowledge in the 1970's of the nature and danger of Bliss' activities to INA before this case was filed. This is equally true, of course, with respect to both INA's primary and excess insurance policies.

The court finds that plaintiffs have failed to establish that before the start of this case, INA possessed sufficient information to enable it to assert its failure-to-mitigate defense, either with respect to its primary or excess policies. At this point then, plaintiffs are not entitled to judgment barring INA from asserting this defense.

B. *Aetna Pollution Exclusion Defense*

Aetna has asserted as a defense that the underlying "dioxin-related claims are based upon allegations of the 'discharge,' 'dispersal' and 'escape' of 'toxic chemicals' and 'waste materials or other irritants, contaminants or pollutants into or upon land,' and therefore the pollution exclusion is *prima facie* applicable to those claims." [20] Aetna noted further in its response to plaintiffs' interrogatory that "[d]iscovery is not complete as to whether the discharge, dispersal or escape was 'sudden and accidental' within the meaning of the exclusion, nor have the facts necessary to resolve this issue been ascertained in

[20] Attachment F to Plaintiffs' Waiver Motion at 34 (Response to Interrogatory 25, Defendant Aetna Casualty and Surety Company's Responses to Plaintiff's First Set of Interrogatories to Defendants; filed May 27, 1986).

the underlying cases." The pollution exclusion defense and its waiver are closely connected with Missouri, the location of the insured risk, because that is where the "pollution" is alleged to have occurred. Missouri law appropriately should control whether plaintiffs are to be indemnified from the consequences of their activity in that state.

Aetna asserted its pollution exclusion defense for the first time in its Answer of June 23, 1985. Plaintiffs argue that this defense should be barred since information adequate to assert this defense was known to Aetna no later than the July 19, 1983 meeting. Plaintiffs point to a letter dated September 14, 1978 in which they notified Aetna of the *Patricia Drinkard* claim and the allegation of how the dioxin was released. That suit, plaintiffs explained, "stems from the alleged disposal of waste materials containing the toxic substance dioxin by using them to settle dust in certain horse arenas and stables." The letter noted further that the suit alleged dioxin had been "sprayed" in and about certain stables.[21]

Aetna retained counsel and investigated the *Drinkard* claim. The July 19, 1983 meeting provided Aetna with extensive information on the nature of the dioxin claims asserted to date. Furthermore, Aetna corresponded with plaintiffs on a number of occasions from 1978 to June 23, 1985, reserving its rights or denying coverage, but solely on the ground that the alleged damages did not occur during one of its policy periods. It was not until its Answer on June 23, 1985 that Aetna notified plaintiffs that it would seek to deny coverage under the pollution exclusion provision.

Aetna contends that plaintiffs "knew far more about the extent of Russell Bliss' spraying activities" than it revealed in its 1978 notice letter, and that it "carefully limited its 1978 'notice' of the extent of the alleged dioxin

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[21] Attachment A to Plaintiffs' Waiver Motion, Exhibit 12, at ¶ 44.

contamination to 'certain horse arenas and stables.' " [22] Aetna emphasizes the continuing uncertainty about facts essential to a determination of whether the discharge was "sudden and accidental."

There is no dispute, however, that by July 19, 1983 Aetna had extensive information on the manner in which Bliss was alleged to have disposed of the dioxin. This information included the allegations of the 'discharge,' 'dispersal,' and 'escape' of 'toxic chemicals' and 'waste materials or other irritants, contaminants or pollutants into or upon land,' the grounds pointed to by Aetna in its Response to Interrogatory 25,[23] asserting that the pollution exclusion was *prima facie* applicable.

The court finds that Aetna knew or should have known by this point of the existence of grounds for asserting a pollution exclusion defense. Although new information may have been uncovered in discovery, and factual questions remain, this information was not necessary before plaintiffs could be notified of Aetna's intention to assert the defense. Aetna's suggestion to the contrary is undermined by the fact that it asserted the defense in its Answer of June 23, 1985, before substantive discovery began. The court must now evaluate plaintiffs' claim that by failing to assert this defense promptly, Aetna has waived it and is barred from asserting this ground to avoid liability on the underlying claims.

Plaintiffs argue that under Missouri case law, when an insurance company has denied coverage on a specific ground, it may not later assert a different ground for denying coverage, citing *Aetna Casualty & Surety Co. v. Haas*, 422 S.W.2d 316, 321 (Mo. 1968) (stating that insurer may not assert a later gas exclusion basis for denying liability after initially denying coverage for

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[22] *See* Plaintiffs' Waiver Motion at 10 (quoting Letter from J.H. Hill to Aetna (Sept. 14, 1978)).

[23] Attachment F to Plaintiffs' Waiver Motion.

house explosion on sole basis that property was in custody and control of insured exterminator); *Stone v. Waters*, 483 S.W.2d 639, 645 (Mo. Ct. App. 1972) (holding defense that automobile not listed in policy schedule barred because liability initially denied on other ground); and *State Farm Mutual Automobile Insurance Co. v. Central Surety and Insurance Corp.*, 405 S.W.2d 530 (Mo. Ct. App. 1966) (denying insurer's supplemental defense that insured was not driving car on business, after insurer initially denied liability for anything more than excess coverage). The pollution exclusion defense should be barred in this case, they assert, because between 1978 and 1985 Aetna consistently denied coverage, or reserved its rights, on the sole ground that the alleged damages occurred outside of the policy periods.

Although the Missouri courts cited above made use of the summary black letter formulation that the assertion of one grounds for defense precludes later assertion of different grounds, a broader view of Missouri law suggests that this principle must be subject to the principles of waiver and estoppel law. Defendants argue that the Missouri doctrine of waiver of insurance defenses requires that in the absence of an affirmative intention by the insurance company to waive the defense, at least some element of estoppel must be present. *See Grafe v. Fidelity Mutual Life Insurance Co.*, 84 S.W.2d 400, 404 (Mo. Ct. App. 1935) (discussing waiver due to failure to assert defense when initially denying liability); *Doerr v. National Fire Insurance Co. of Hartford*, 315 Mo. 266, 285 S.W. 961, 963-64 (Mo. 1926) discussing waiver due to insurer instructing insured on how to make a statement and proofs of loss); *Bartleman v. Humphrey*, 441 S.W.2d 335, 343 (Mo. 1969) (discussing waiver of forfeiture from unpaid premium, due to insurer treating check as payment and delaying presentment of check for payment).

Plaintiffs have not shown any direct evidence that Aetna intended to waive its right to assert a pollution

exclusion defense. Indeed the record clearly suggests that it did not. Although Aetna's 1983 letters denied coverage on the basis that the claims involved damages outside the policy periods, each letter added that this denial was "without waiver of any other policy conditions or defenses." The Interim Agreement, signed by Aetna and the plaintiffs, also included a statement that "no waiver or estoppel shall arise as a result of this Interim Agreement, or any delay in its having been entered, nor shall any exclusion or other limitation be considered waived."[24]

Nor have plaintiffs shown a sufficient "element of estoppel" to support denying its defense. Plaintiffs assert that the "trouble and expense" of bringing this action is sufficient prejudice to justify barring Aetna from asserting its pollution exclusion defense. *See State ex rel. Shelter Mutual Ins. Co. v. Crouch*, 714 S.W.2d 827, 828 (Mo. Ct. App. 1986) ("no Missouri case has required any more than a very slight degree of prejudice to the claimant in this situation, it being held that the mere trouble and expense of bringing suit is enough;" quoting *Morris v. Reed*, 510 S.W.2d 234, 240 (Mo. Ct. App. 1974)). It appears that the trouble and expense of this suit would have been necessary in any case, however, as Aetna denied coverage on a separate ground as well and other defendants also have asserted pollution exclusion defenses.

The court concludes that the "prejudice" asserted by plaintiffs is insufficient as a matter of law to justify barring Aetna from raising its pollution exclusion defense.[25] Summary judgment would be inappropriate here even absent this conclusion, however, based on a second objection to the application of this waiver rule here.

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[24] Partial Joint Opposition to Plaintiff's Waiver Motion, Attachment at 5.

[25] An analysis that supports this conclusion more thoroughly is set out below in part IV.D (Hartford's Conduct in Disregard of Laws Defense).

The Missouri courts have held that the doctrines of waiver and estoppel will not apply in such situations to "create" coverage where it is not provided under the policy. *See Lawrence v. New York Life Insurance Co.*, 649 S.W.2d 461, 465 (Mo. Ct. App. 1983) (defense that double indemnity coverage did not apply to risk of gas inhalation not barred by insurer's failure to inform insured promptly of extent of coverage); *State Farm Mutual Automobile Insurance Co. v. Hartford Accident & Indemnity Company*, 646 S.W.2d 379, 381 (Mo. Ct. App. 1983) (defense that Excludes J excludes coverage of automobile purchased during policy period for which other insurance is purchased not barred even if insurer initially denied coverage on other ground); *Martinelli v. Security Insurance Co. of New Haven*, 490 S.W.2d 427, 434 (Mo. App. 1972) (insurer not barred from asserting exclusion for business pursuits despite insurer's suggestion at earlier trial that claim covered).

Under these cases, it is inappropriate to allow certain defenses to be implicitly waived by the failure to notify the insured timely of such defenses where the insured had no reasonable expectation of coverage under the policy. Explicit policy exclusions, such as a pollution exclusion, clearly call for the application of this limitation on waiver and estoppel because their clear notice to the insured that the policy does not cover such risks.

Missouri courts have allowed certain types of defenses to be implicitly "waived," such as "forfeiture" provisions. These provisions are conditions under general contract law, such as the insured's obligation to notify promptly the insurer of a potential claim, which if not met, excuse the insurer from performing on the contract. *See Bartleman v. Humphrey*, 441 S.W.2d at 343 ("forfeiture of an insurance contract for nonpayment of premium is not favored in the law and the courts are prompt to seize upon circumstances which indicate an election to waive the forfeiture"). A rule that allows a forfeiture defense

to be implicitly waived may be viewed as consistent with the rule against creating coverage because unlike the case of explicit exclusion, in a forfeiture case the insured did contract for insurance covering the risk at issue, justifiably expects coverage under the policy, and reasonably will act in reliance on that expectation unless notified by the insurer of some grounds for denying coverage. The Missouri courts have characterized this distinction as one between creating coverage and preserving preexisting rights. *See Stone v. Waters*, 483 S.W.2d at 646; *Blew v. Connor*, 328 S.W.2d 626, 631 (Mo. 1959) (en banc) (referring reader to Court of Appeals decision, 310 S.W.2d 294, 303-04 (Mo. Ct. App. 1958) for full discussion of this point).

Plaintiffs argue that the Missouri Supreme Court held in *Aetna Casualty & Surety Co. v. Haas* that policy exclusions can be waived by an insurer's failure to promptly notify the insured of its intent to rely on them. *See Haas*, 422 S.W.2d at 321. The *Haas* case did not involve an exclusion provision integrated into the description of policy coverage, however, and does not conflict with this court's analysis.

The Missouri appellate courts cited above as, which hold that insurance coverage could not be created by the doctrines of waiver and estoppel, considered and distinguished the Missouri Supreme Court's decision in *Haas*. In *State Farm Mutual Automobile Insurance Co. v. Hartford Accident & Indemnity Co.*, the court noted that *Haas* involved a "purported exclusion," contained in an attached "rating classification sheet" that was held *not* to modify the policy. 646 S.W.2d at 382. As such, it offers no guidance about how the Missouri Supreme Court would treat an argument for the implied waiver of an explicit exclusion such as a pollution exclusion.

Lawrence v. New York Life Insurance Co. pointed out that the *Haas* court had already determined that the alleged exclusion did not modify the policy before it applied

the general rule that a stated reliance on one defense will preclude the later assertion of a different defense. *Lawrence* concluded that this additional, closing rationale of the *Haas* court's decision "did not actually rule any viable issue in the *Aetna* [*v. Haas*] case and is therefore *dictum*." 649 S.W.2d at 466.

The line between creating coverage and preserving a pre-existing right to coverage may be difficult to discern in some cases, as where the basis for the defense alleged to have been waived is neither a forfeiture condition nor an explicit exclusion provision.[26] Nonetheless the rule surely prevents the waiver of an explicit exclusion such as the pollution exclusion clause which specifically states that the activities encompassed by the exclusion are not covered under the policy. To bar Aetna from asserting this defense, according to the reasoning of the rule, would be to rewrite the policy to cover risks specifically excluded from it. Plaintiffs have not presented sufficient reason in law or equity to do so. The court finds that Aetna has not waived its pollution exclusion defense.

C. *Hartford Pollution Exclusion Defense*

In Hartford's Answer to plaintiffs' First Amended Complaint, filed July 26, 1985, Hartford denies for the first time any obligation to plaintiffs for "property damage or bodily injury caused by the discharge of pollution unless the pollution was sudden and accidental." [27] Plaintiffs assert that as early as 1975, they gave Hartford notice of how Bliss had discharged the dioxin, enabling Hartford to assert a pollution exclusion defense if it intended to. In a letter dated October 27, 1975, plaintiffs informed Hartford of the *Jerry Drinkard, et al.* claim.

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[26] *See, e.g., Stone v. Waters*, 483 S.W.2d 639 (Mo. Ct. App. 1972) (holding defense that automobile not listed in policy schedule barred because liability initially denied on other ground; ruling said not to create coverage but preseerve insured's pre-existing rights).

[27] Attachment B to Plaintiffs' Waiver Motion.

This letter stated quite bluntly, "Our contractor, instead of safely disposing of the [dioxin] material, used it to settle dust in certain horse arenas and stables." [28]

There is no dispute that plaintiffs provided Hartford with substantial information concerning the nature of Russell Bliss' disposal activities, and allegations relating thereto, at the meeting in July 1983. The court finds here, as with Aetna, that at least by the time of that meeting, Hartford had sufficient information to notify plaintiffs of its intention to assert a pollution exclusion defense.

Plaintiffs have not shown that Hartford affirmatively intended to waive its pollution exclusion clause by not asserting it prior to 1985. Moreover, any inferences to be drawn from Hartford's actions must be drawn in favor of Hartford. *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986). Hartford attempted to reserve its rights in numerous letters to plaintiffs before and after 1983. Hartford signed the Interim Agreement, as did plaintiffs, which purported to reserve the rights of all parties. This defendant also claims that plaintiffs knew of its intention to rely on a pollution exclusion defense for many years prior to its July 26, 1985 pleading, as a result of oral conversations between counsel.

In addition to their inability to demonstrate defendants' intent to waive, plaintiffs have made no greater showing of prejudice from Hartford's delay than the trouble and expense of bringing this suit, an effort that most likely would have been necessary even if this delay had not occurred. As the court's analysis in part IV.D below explains, this is insufficient "prejudice" as a matter of law.

Hartford, like Aetna, seeks to assert as a defense that the underlying claims come within the terms of its pollution exclusion clause and so are not covered by its policies.

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[28] Attachment A to Plaintiffs' Waiver Motion (Exhibit 4).

As this exclusion indicates that these risks are not covered under the policies, defendant argues, this defense cannot be waived by delay in asserting it. Under these circumstances, and for the reasons set forth earlier in part IV.B (Aetna Pollution Exclusion Defense), the court agrees and finds that Hartford is not barred from asserting its-pollution exclusion defense.

D. *Hartford Conduct in Disregard of Law Defense*

Also in its July 26, 1985 Answer, Hartford for the first time asserts as a defense that its policies do not cover "liability arising out of [plaintiffs'] actions or conduct in express disregard of their legal obligations under state, federal or local laws and regulations." [29] Plaintiffs argue that the *Vickers* claim, which they notified Hartford of on December 16, 1982, raised this issue. The *Vickers* complaint alleged that "the sale, distribution, use and method of disposal of said contaminated waste oil by the defendants constitutes a violation of the Federal Hazardous Substances Act . . . ."

Hartford responded to the *Vickers* claim with a "provisional response" stating that it was "fully preserving [its] rights." [30] Following the July 1983 meeting, which Hartford concedes provided it with sufficient information to adequately evaluate its coverage defenses, Hartford contends that it continued to take the position that it was fully reserving its rights as to whether it would or would not defend or indemnify plaintiffs, until it had "fully reviewed the matter." [31] Plaintiffs note, however, that al-

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[29] Attachment B to Plaintiffs' Waiver Motion (Hartford Answer at ¶ 27).

[30] Attachment 2 to Memorandum of Points and Authorities in Support of Hartford Accident and Indemnity Company's Opposition to Plaintiffs' Motion for Partial Summary Judgment Against Certain Defendants with Respect to the Waiver of Defenses. ("Hartford's Opposition to Plaintiffs' Waiver Motion").

[31] Attachment 3 to Hartford's Opposition to Plaintiffs' Waiver Motion.

though Hartford stated in a February 24, 1983 letter that it "has now reviewed these matters completely," including the *Vickers* claim, Hartford failed to assert the conduct-in-disregard-of-laws defense until much later.

The court finds that the *Vickers* complaint's assertion of a violation of the Federal Hazardous Substances Act was sufficient to put Hartford on notice of the potential applicability of this defense. Hartford gives no persuasive reason why a reasonably prompt investigation did not enable it to determine whether the disregard-of-laws defense was viable. Hartford's claim that it continued to provide only provisional responses, even if accepted as true, does not explain why an investigation did not make a final response possible. Hartford's contention that it has discovered new information, not provided by plaintiffs, that supports its defense does not refute plaintiffs' well-founded assertion that it possessed *sufficient* information to assert that defense in 1983.

The court finds from the undisputed facts recounted above that shortly after receiving notice of the *Vickers* claim, Hartford had sufficient knowledge as a matter of law to assert their conduct-in-disregard-of-law defense. The court must now determine whether by failing to assert that defense until 1985, Hartford has waived it.

The court finds that Missouri law should properly govern this issue as the interests of Missouri are strongly implicated in the question of whether plaintiffs should be indemnified for conduct which it is alleged was in express disregard of local, state and federal laws and regulations. This defense is based on conduct which is alleged to have occurred in Missouri and which is alleged to have been in disregard of Missouri law.

Hartford argues that the conduct-in-disregard-of-laws defense cannot be waived because to do so would be to create coverage not originally provided under the contract. *See Lawrence v. New York Life Insurance Co.*, 649

S.W.2d at 465; *State Farm Mutual Automobile Insurance Co. v. Hartford Accident & Indemnity Company*, 646 S.W.2d at 381; *Martinelli v. Security Insurance Co. of New Haven*, 490 S.W.2d at 434.

As the court discussed earlier,[32] however, under the law of Missouri certain insurance coverage defenses may be waived, under the proper circumstances, when coverage for the risk was originally provided under the policy. A defense may be barred, the Missouri courts have said, when to do so would preserve pre-existing rights, rather than create coverage. *Compare Stone v. Waters*, 483 S.W.2d at 645 *with Lawrence v. New York Life Insurance Co.*, 649 S.W.2d at 465. *See also Blew v. Connor*, 328 S.W.2d at 631 (citing discussion in Court of Appeals' decision, 310 S.W.2d at 303-04).

Unlike its pollution exclusion defense, Hartford's defense that plaintiffs are not entitled to coverage because they acted without regard for the law is not based on an explicit exclusion in their policies. Rather, if successful, it would act to prevent plaintiffs from realizing coverage that otherwise was clearly provided under the policies. This defense then, is closer in kind to a forfeiture provision, which bars the enforcement of pre-existing rights under a policy, than it is to an explicit policy exclusion, which designates certain activities as outside the coverage provided by the policies. The court concludes that in the proper circumstances, Hartford's defense of conduct-in-disregard-of-laws may be waived under Missouri law.

Both parties agree that under Missouri law: "in insurance cases the intention to waive must plainly appear, or else the conduct relied upon as constituting waiver must involve *some* element of estoppel." *Schwab v. Brotherhood of American Yeoman*, 305 Mo. 148, 264 S.W. 690, 692 (1924) (emphasis in original). Plaintiffs argue that

[32] *Supra* part IV.B (Aetna's Pollution Exclusion Defense).

they do not need to show Hartford's intent to waive this defense because Hartford's knowledge of the defense and their failure to assert it clearly establishes this. Absent some element of estoppel, however, Missouri law requires that waiver be shown either by "express declarations [or if] implied by conduct, there must be a clear, unequivocal, and decisive act of party showing such purpose, and so consistent with intention to waive that no other reasonable explanation is possible." *Bartleman v. Humphrey*, 441 S.W.2d at 343. The circumstances of Hartford's delay in asserting this defense clearly do not meet this standard.

Plaintiffs assert again that the "trouble and expense" of bringing this action satisfies the requirement stated in *Schwab* that "the conduct relied upon as constituting waiver must involve some element of estoppel." Plaintiffs cite *Shelter v. Crouch*, 714 S.W.2d 827, and *Morris v. Reed*, 510 S.W.2d 234, to support this assertion. Hartford argues that although these cases support the view that only a slight degree of prejudice is required for waiver, the filing of this suit does not satisfy even that minimal threshold. Unlike in *Crouch*, for example, there is no indication that the delay in Hartford's asserting its disregard-of-laws defense caused any prejudice to plaintiffs ability to prepare to meet that defense.

In *Crouch*, the insurer was barred from asserting an arson defense that it had failed to raise when it first denied the claim. The court recognized the likelihood of prejudice in preparing to meet an arson defense, if an appropriate investigation is not made promptly after the loss, stating "[i]f certain defenses can be raised later, an insurance company can make it impossible for an insured to know what the real defense is and thus mislead an insured into not investigating that defense. When the insured learns of the defense it may be too late for a proper investigation." 714 S.W.2d at 828.

In *Morris* as well, the court found that the insured had suffered substantial prejudice from the insurer's delayed

assertion of certain defenses: "Much more trouble and expense has been caused to this plaintiff than just the normal filing of a lawsuit. The evidence shows that Home and its representatives followed a course of conduct calculated to deflect plaintiffs from the insurance company as his target . . . ." 510 S.W. at 241.

There is no indication that plaintiffs have suffered any prejudice, outside of this lawsuit, as a result of Hartford's assertion of this defense in 1985. Plaintiffs do not claim, however, that this suit would have been unnecessary if Hartford had asserted this defense in 1983 or earlier. The fact that plaintiffs must now litigate the issue raised by this defense does not constitute a sufficient "element of estoppel," in the view of this court, to justify barring this defense.

The court finds that plaintiffs are not entitled to a judgment barring Hartford from asserting its defense of conduct in disregard of laws.

E. *American Home, Lexington & ISOP Pollution Exclusion Defense*

On September 2, 1986 excess insurers American Home, Lexington and ISOP notified plaintiffs' counsel by letter of their intention to reserve their rights, based on various coverage defenses, including a pollution exclusion defense. This defense had not been raised in the defendants' Answer or Amended Answer, nor in any prior written communications with plaintiffs. Plaintiffs have moved for summary judgment barring these defendants from raising a pollution exclusion defense. Plaintiffs argue that in failing to assert this defense promptly after acquiring the information necessary to establish it, American Home, Lexington and ISOP waived their pollution exclusion defenses.

In evaluating plaintiffs' claim, the court must first determine whether they have shown that defendants possessed the information necessary to establish the pollution

exclusion defense prior to September 1986. Lexington and ISOP acknowledge that they attended the July 19, 1983 informational meeting. American Home, it is undisputed, did not attend the meeting and objects to plaintiffs' implicit suggestion that knowledge of the substance of the meeting should be imputed to it because of its corporate relationship to Lexington and ISOP. American Home's knowledge of what transpired at this meeting is at least partially in dispute.

None of the three defendants disputes that it received copy of the *Wehner* complaint by letter dated April 14, 1983. The complaint alleged that Bliss, working for IPC, "sprayed [dioxin-laden oil] as a dust-control measure on unpaved roadways in various Missouri towns." Ex. 5 at 17-18. The *Wehner* complaint clearly spells out the method by which dioxin found its way to the roadways and horse arenas of Missouri. American Home can hardly assert that this complaint was insufficient notice merely because the "facts" asserted were allegations. These allegations were clearly sufficient to warrant a prompt investigation.

Even leaving time for investigation, the court finds that American Home knew or should have known of the existence of grounds for its pollution exclusion defense by late 1983. It is clear also that Lexington and ISOP similarly had sufficient knowledge following the July 19, 1983 meeting to allow even earlier notice to plaintiffs of its pollution exclusion defense. The court must now determine whether defendants have waived their right to assert a pollution exclusion defense by failing to assert it prior to 1986.

Defendants argue that as excess insurers, American Home, Lexington and ISOP are not obligated to advise plaintiffs of their coverage positions until the underlying primary insurers' coverage is exhausted. The court need not determine whether this distinction is sanctioned under Missouri law, however, as it concludes that plaintiffs

(1) have failed to show either an affirmative waiver or some element of estoppel sufficient to support a finding that defendants had waived their pollution exclusion defenses and (2) plaintiffs' assertions of implied waiver cannot create coverage explicitly excluded from the policy by the pollution exclusion clause.

Plaintiffs base their argument for waiver on the black letter rule that "an insurer, having denied liability on a specified ground, may not thereafter deny liability on a different ground." *Stone v. Waters*, 483 S.W.2d at 645. Although these defendants have not affirmatively denied coverage on any ground, plaintiffs suggest that defendants' "inaction" should be treated as a denial. This conclusion is unwarranted by the facts and the law.

The court above has noted that the plaintiffs' claim for judgment must satisfy the conditions of Missouri law on waiver and estoppel.[33] Missouri law regarding the waiver of insurance defenses requires that "intention to waive must plainly appear or else the acts or conduct relied upon constituting waiver must involve some element of estoppel." *Bartleman v. Humphrey*, 441 S.W.2d at 343 (citations omitted). Plaintiffs do not contest that these defendant excess insurers have no present obligation to defend or indemnify them. Nor do plaintiffs dispute that they did not seek to have excess insurers presently defend or indemnify them, or join in the Interim Agreement. Within this factual context, these defendants' failure to notify plaintiffs of its coverage position prior to 1986 does not "plainly" suggest their intention to waive a pollution exclusion defense. *See also* A. Windt, *Insurance Claims and Disputes*, § 2.18 at 52 (1982) ("insurer should not be deemed to have waived its right later to deny coverage simply by virtue of its silence in a situation in which it is not yet obligated to begin providing any policy benefits") (footnote omitted).

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[33] *See supra* part IV.B (Aetna Pollution Exclusion Defense).

Plaintiffs also have failed to show any prejudice from defendants' delay in asserting this defense, other than the "trouble and expense" of bringing this suit. The court has already determined above that the necessity of filing this action does not constitute the "element of estoppel" required to establish a "waiver."[34] Plaintiffs have not shown that they had even requested that defendants defend or indemnify them, prior to the filing of this suit. In *Hunt v. State Farm Mutual Auto Insurance Co.*, 560 S.W.2d 280, 283 (Mo. Ct. App. 1977), the court held that there was no estoppel when the insured had not made a claim on the policy prior to the suit being filed. This court finds that plaintiffs have not asserted sufficient facts of waiver or estoppel to justify barring American Home, Lexington and ISOP from asserting their pollution exclusion defenses.

The court notes also that the defense at issue here is based on a pollution exclusion clause, which limits the scope of the policy stating that risks coming within its terms are not covered. The court concludes that based on its earlier discussion of the Missouri rule against insurance coverage being created by the doctrines of waiver or estoppel,[35] plaintiffs are not entitled to a judgment barring American Home, Lexington and ISOP from asserting its pollution exclusion defense.

F. *Harbor Pollution Exclusion Defense*

Excess insurer Harbor first asserted its pollution exclusion defense in its Answer of August 12, 1985. In its answers to interrogatories, Harbor states that it bases its defense in part on the assertion that the dioxin contained in the waste oil spread on Missouri lands "constitutes 'toxic chemical and/or waste materials,' and/or 'irritants,' and/or 'contaminants,' and/or 'pollutants' which

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[34] *See supra* part IV.D (Hartford Conduct in Disregard of Law Defense).

[35] *See supra* part IV.B (Aetna Pollution Exclusion Defense).

were 'discharged' and/or 'dispersed' upon land by Russell M. Bliss as an agent of the Plaintiffs." [36] Plaintiffs assert that Harbor knew this information as of the July 1983 meeting. Harbor does not dispute this and acknowledges that it did not provide plaintiffs with any information regarding its coverage position prior to its Answer in this case on August 12, 1985. Plaintiffs argue that by failing to inform them promptly of its intention to assert a pollution exclusion defense, Harbor waived its right to that defense.

Plaintiffs have shown no more evidence of waiver than Harbor's silence, in the face of plaintiffs' extensive negotiations with primary insurers—but not excess insurers—for a defense agreement. The court has held above [37] that with regard to excess insurers, where primary coverage has not been exhausted, this showing is insufficient as a matter of law to establish an intention to waive. Plaintiffs' prejudice is similarly confined to the burden of bringing this suit, which the court has also concluded is inadequate as a matter of law to establish the necessary element of estoppel.[38] The court finds that plaintiffs have not shown sufficient evidence of waiver or estoppel, as a matter of law, to warrant barring Harbor from asserting its pollution exclusion defense.

The defense at issue, here, furthermore, is based on a written pollution exclusion clause contained in the policy, which states that the risks within its definition are not covered under the policy. The court finds that because of the Missouri rule against the creation of coverage by implied waiver, plaintiffs are not entitled to a judgment barring Harbor from asserting its pollution exclusion defense.[39]

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[36] Attachment M to Plaintiffs' Waiver Motion at 40-41.

[37] *See supra* part IV.E (American Home, Lexington and ISOP Pollution Exclusion Defenses).

[38] *See supra* part IV.D (Hartford Conduct in Disregard of Laws Defense).

[39] *See supra* part IV.B (Aetna Pollution Exclusion Defense).

V. *Summary*

The court grants plaintiffs' motion for partial summary judgment declaring that INA has waived its nondisclosure defense with respect to its primary policies. The remaining waiver motions are denied.

2. *NONDISCLOSURE*

Defendants INA and U.S. Fire have moved for summary judgment declaring that their insurance policies do not impose any obligations on them with regard to plaintiffs' dioxin-related liability, on the ground that plaintiffs failed to disclose certain material information when applying for insurance coverage for the years 1981-1983. More specifically, defendants assert that plaintiffs should have disclosed the existence of a number of dioxin-related claims, known as the "first series" of claims, that were filed during the period 1975-1979. This information was called for, according to defendants, as part of plaintiffs' statement of losses for the period 1975-1979 because these claims were expected to impact on the policies covering this period.

Plaintiffs argue that they were under no obligation to provide defendants with information of claims filed during these years nor was this information requested. They contend that although the claims in question were filed during the 1975-1979 period, they were properly not included in the loss histories of this period, which they agree their applications and submission purported to present. A loss history, according to plaintiffs, only includes claims or losses which have been paid or for which reserves have been set aside for a given policy year.

Defendants INA and U.S. Fire based their motions, alternatively, on the statutory law of Florida or New York, which they argue bars plaintiffs who have failed to disclose material information requested by a prospective insurer from collecting on any policies entered into subject to this nondisclosure.

Plaintiffs assert that defendants' allegations of nondisclosure do not satisfy several of the statutes' requirements, including that the undisclosed information (1) was requested by the insurer, or otherwise falsely represented and (2) was material to the insurer's decision to enter into the contract. Plaintiffs argue that an earlier decision of the court concluded that these questions are factual and should be left to the jury, and that the logic of that decision applies here precluding summary judgment. *See* Memorandum of January 8, 1987 at 8-10 (denying INA primary policy motion for summary judgment on nondisclosure grounds; applying Florida law). Finally, plaintiffs claim that INA and U.S. Fire have waived their nondisclosure defenses, as discussed in their waiver motion.

The analysis below will first determine which state's law will govern this issue, and then examine defendants' claims in the following order: (a) INA primary policies; (b) INA excess policies; and (c) U.S. Fire excess policies.

I. *Choice of Law*

The court has already determined that Florida law governs the issue of nondisclosure for INA's primary policies.[40] The court also has ruled that where the policies at issue designate New York law as controlling, and New York law does not conflict with a fundamental policy of the state with the greatest interest in the nondisclosure issue, New York law would govern.[41] The excess insurance policies of both INA and U.S. Fire state that New York law should be applied.

In their pleadings on the present motions, both INA and U.S. Fire have agreed that there is no conflict between New York and the law of Florida—the state with

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[40] Memorandum of January 8, 1987 at 3-5; *supra* section 1 (Waiver of Defenses) part III (Formation Issues).

[41] *IPC v. Aetna*, 654 F.Supp. at 1357.

the greatest interest in the nondisclosure interest—but argue that if such a conflict arises, Florida law should control. Plaintiffs have agreed that there is no conflict between the relevant law of New York and Florida and acknowledge the primacy of Florida's interest in the resolution of this issue.

The court agrees with the parties' assessment that relevant New York law presents no conflict with any fundamental policy of Florida law. The relevant New York statute, N.Y. Ins. Law § 3105 (McKinney 1985),[42] and case law reflect principles that are very similar to those embodied in the relevant Florida statute, Fla. Stat. § 627.409 (1981),[43] and precedent.

In both New York and Florida, an insurer may avoid coverage under its policies on grounds of nondisclosure where the insured has (1) made a false representation or failed to provide information requested by the insurer, (2) which is material to the insurer's decision to enter

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[42] *See infra* section 2 (Nondisclosure) part III (INA Excess Policies).

[43] (1) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by or on behalf of the insured or annuitant, shall be deemed to be representations and not warranties.

Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless either:

(a) Fraudulent; or

(b) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or

(c) The insurer in good faith either would not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

Fla. Stat. § 627.409 (1981).

into the proposed contract. *Compare Kulikowski v. Roslyn Savings Bank*, 121 A.D.2d 603, 503 N.Y.S.2d 863, 864 (N.Y. App. Div.) (applying § 3105), *appeal dismissed*, 69 N.Y.2d 705, 504 N.E.2d 691, 512 N.Y.S.2d 364 (N.Y. 1986) *and Vander Veer v. Continental Casualty Co.*, 34 N.Y.2d 50, 312 N.E.2d 156, 356 N.Y.S.2d 13, 14-15 (1974) (applying N.Y. Ins. Law § 149, precursor to § 3105) *with Continental Assurance Co. v. Carroll*, 485 So.2d 406, 409 (Fla. 1986) (construing § 627.409) *and Roess v. St. Paul Fire and Marine Ins. Co.*, 383 F.Supp. 1231, 1236 (M.D. Fla. 1974) (interpreting § 627.409; discussing statute's departure from common law).

Even if a given case would have different outcomes in these two jurisdictions, this variance between the law of the two states does not present the kind of fundamental conflict that would prevent the application of New York law here. *See* Restatement (Second) of Conflict of Laws § 187 comment g (1971) ("The forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state of the otherwise applicable law.") The court does not believe, moreover, that the application of Florida law would produce a different resolution of this issue.

In light of the absence of conflict between the relevant New York law and any fundamental policy of Florida law, the court will apply the choice of law made by the parties at the time of contracting—New York law.

II. *INA Primary Policies*

The court has ruled above that INA is barred from asserting its nondisclosure defense with regard to its primary insurance policies because of its failure to promptly

notify plaintiffs of its intent to assert that defense, as required by Florida statute section 627.426(2).[44]

III. *INA Excess Policies*

With regard to INA's excess insurance policies, the court above has denied plaintiffs' motion to bar a nondisclosure defense on waiver grounds.[45] As the choice-of-law discussion above indicates, INA's excess insurance policy nondisclosure defense will be governed by New York law. The relevant New York statute reads as follows:

> § 3105 Representations by the insured
>
> (a) A representation is a statement as to past or present fact, made to the insurer by, or by the authority of, the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof. A misrepresentation is a false representation, and the facts misrepresented are those facts which make the representation false.
>
> (b) No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless such misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make such contract.
>
> . . . .

N. Y. Ins. Law § 3105 (McKinney 1985).

Policy coverage may be avoided under this statute where two essential elements are established: (1) a misrepresentation, (2) which is material. *Kulkowski*, 503 N.Y.S.2d at 864 (applying § 3105). Each of these de-

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[44] *Supra* section 1 (Waiver of Defenses) part III.A.a (INA Nondisclosure Defense—Primary Insurance Policies).

[45] *Supra* section 1 (Waiver of Defenses) part III.A.b (INA Nondisclosure Defense—Excess Insurance Policies).

terminations is ordinarily a question of fact, *Leamy v. Berkshire Life Ins. Co.*, 39 N.Y.2d 271, 347 N.E.2d 889, 383 N.Y.S.2d 564, 565 (1976) (applying § 149), although where the evidence is clear and substantially uncontradicted, the court may find these elements to be established as a matter of law. *See Vander Veer v. Continental Casualty Co.*, 356 N.Y.S.2d at 14 (1974) (finding misrepresentation and materiality established as a matter of law; applying § 149); *Kulikowski*, 503 N.Y.S.2d at 864 ("where the evidence concerning the materiality is clear and substantially uncontradicted, the matter is one for the court to determine") (citations omitted).

Although an action for fraudulent concealment exists at common law,[46] INA's claim for summary judgment is based on statutory law, which will apply even where the material misrepresentation is made innocently. *See Geer v. Union Mutual Life Ins. Co.*, 273 N.Y. 261, 7 N.E.2d 125, 126 (1937) (applying Insurance Law § 58, precursor to § 149); *Kulikowski*, 503 N.Y.S.2d at 864. *Cf. Continental Assurance Co. v. Carroll*, 485 So.2d at 408 (applying Fla. Stat. § 627.409(1)).

INA claims two instances of misrepresentation by the plaintiffs regarding the same information. The first is alleged to have occured when plaintiffs failed to disclose the first series of dioxin claims when responding to question #14 in plaintiffs' applications for excess insurance: "State loss record during past five years specifying: (a) Full details of all claims (whether insured or not) in excess of $10,000 . . . ." The second instance is said to have resulted from plaintiffs' representation at the close of the application that "We know of no other relevant facts which might affect Underwriter's judgment when

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[46] *See Sebring v. Fidelity-Phenix Fire Ins. Co. of New York*, 255 N.Y. 382, 174 N.E. 761 (1931); *Lighton v. Madison-Onondaga Mutual Fire Ins. Co.*, 106 A.D.2d 892, 483 N.Y.S.2d 515 (N.Y. App. Div. 1984).

considering this application," [47] while failing to disclose these dioxin claims.

In evaluating the first instance of misrepresentation asserted, the court must determine what information was requested in order to determine whether plaintiffs' answer can be said, as a matter of law, to constitute a misrepresentation. If plaintiffs have fully disclosed the information requested—based on a reasonable construction of the question presented—then there is no misrepresentation, even if the defendants' construction of the question would be different. *Compare Geer*, 7 N.E.2d at 127-28 (nondisclosure resulting from reasonable construction of question constitutes no suppression of the truth, and thus no false representation) *with Process Plants Corp. v. Beneficial National Life Insurance Co.*, 53 A.D.2d 214, 385 N.Y.S.2d 308, 311-12 (N.Y. App. Div. 1976) (noting that where application question requests an opinion, if answered in good faith, mistaken response would not constitute a misrepresentation, but concluding case at bar *not* a situation in which applicant was asked to give opinion), *aff'd*, 42 N.Y.2d 928, 366 N.E.2d 1361, 397 N.Y.S.2d 1007 (1977).

Plaintiffs argue that question #14 requested a report of incurred losses assigned to the 1975-1979 policy years. Plaintiffs argue that it is their practice, as well as insurance industry custom, to supply accrued loss information when applying for insurance coverage and that INA knew or should have known that this is what was provided. Incurred losses, they continue, mean actual losses paid or reserved against. The first series of dioxin claims were not included in the loss summaries provided in response to this question, plaintiffs explain, because these claims had been assigned by their insurers to policy years preceding the five-year period requested.

INA argues that question #14 called for the disclosure of all claims paid or expected to impact the policy

[47] Attachments 16 & 17 to INA Nondisclosure Motion.

years 1975-1979. INA offers the deposition testimony of Thomas Terbrueggen, who was then assistant risk manager for plaintiffs, to support its position that plaintiffs purported to provide loss information that included all claims expected to impact the relevant policy years.[48] Implicit in INA's argument is the assertion that plaintiffs understood question #14 to request that information.

Terbrueggen's acknowledgment, however, is insufficient evidence of plaintiffs' understanding to support a motion for summary judgment. INA cites Terbrueggen's affirmative response to the question "is it your understanding at the time that the list of losses . . . presented claims and losses by the policy years such claims and losses would impact?" Unfortunately, Terbrueggen was not asked, nor did he volunteer, whether he was referring to all "claims" or only claims for which funds had been reserved. The court is not prepared to read this acknowledgement as an adoption of INA's position.

At most, INA presents a factual question of whether plaintiffs understood question #14 to request loss information on all claims that they expected to impact the policy years 1974-1979, rather than just accrued losses for this period. Without better support for INA's assertion, however, the court must accept plaintiffs' version of the facts for purposes of this motion.[49]

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[48] Attachment 3 to INA Nondisclosure Motion (Dec. 9, 1986 Deposition of Thomas Terbrueggen). *See also* Attachment 5 to INA Nondisclosure Motion at 2 (Letter from Ray M. VanLandingham to Peter W. Kininmonth Nov. 30, 1983) ("As requested by this application, this schedule presents claims and losses by the policy year such claims and losses would impact.").

[49] In its Memorandum Opinion of January 8, 1987, the court similarly concluded that "It is up to the finder of fact to determine . . . what the standard insurance industry practice is with respect to the assignment of claims to policy years different from the calendar years in which those claims are filed." Memorandum Opinion of Jan. 8, 1987 at 8.

Should a jury at trial find the facts consistent with plaintiffs' version, plaintiffs' construction of question #14 would appear to be reasonable. INA does not contest that plaintiffs provided full disclosure of all accrued losses. This disclosure then, would not constitute a misrepresentation. Having failed to establish this essential requirement, INA's motion for summary judgment must be denied.

INA also cites plaintiffs' efforts to obtain coverage for these early dioxin claims under its 1975-1979 policies as evidence of their expectation that these claims would impact these policy years.[50] Under the analysis above, however, this information may not have been requested by question #14, and so its nondisclosure would not constitute a misrepresentation.

Although INA presents supporting testimony to demonstrate the materiality of the claims information they allege should have been disclosed,[51] the court will not address this second element as it relates to question #14, since summary judgment is precluded by the factual dispute over whether the absence of the early dioxin claims from the loss histories supplied to INA by plaintiffs constituted a misrepresentation.[52]

INA alleges a second instance of misrepresentation within plaintiffs' application for excess insurance. At the

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[50] *See* Attachment 29 to INA Nondisclosure Motion (Letter of Jan. 2, 1980 from J.H. Hill, Jr. to Aetna); Attachment 28 to INA Nondisclosure Motion at 600-03 (Deposition of Jennings H. Hill, Jr. Nov. 6, 1986).

[51] *See* Attachment 12 to INA Nondisclosure Motion at ¶ 4 (Affidavit of Howard E. Tyrrell Feb. 12, 1987); Attachment 15 to INA Nondisclosure Motion at ¶ 9 (Declaration of Clifton E. Harrison Mar. 12, 1986).

[52] *Cf.* Memorandum Opinion of Jan. 8, 1987 at 9 ("it should be noted that the question of the materiality of IPC's alleged nondisclosure is an issue to be decided by a finder of fact, not by the court on a motion for summary judgment").

end of the applications, just before the signature line, appears the representation: "We know of no other relevant facts which might affect Underwriter's judgment when considering this application." [53] INA argues that this statement was a material misrepresentation, as plaintiffs knew INA's consideration of their application would be affected by knowledge of the first series of dioxin claims. INA supports its assertion with evidence that plaintiffs were seeking coverage of the early dioxin claims from its primary and excess insurance policies for the period including 1975-1979,[54] indicating that plaintiffs knew these claims had significance for future policy years.

Plaintiffs explain that at the time of their applications for excess insurance with INA, they did not anticipate the potential for additional dioxin claims, and so did not believe this information was material to INA's decision. The *Lori Piatt* suit, filed in 1979, was the last of the first series of claims. This suit was delayed, according to plaintiffs, because the claimant was a minor at the time she allegedly came into contact with dioxin sprayed by Russell Bliss in 1971. By 1979, only three people had filed personal injury claims arising out of the sprayings. Consequently, plaintiffs assert, they reasonably did not believe that knowledge of these claims would affect INA's judgment on their application.

INA also offers the testimonial evidence of insurance officials involved in the negotiating of plaintiffs' policies with INA. Howard E. Tyrrell, former Director of Risk Management for plaintiffs, states in his affidavit: "The information contained in the January 2, 1980 letter [notifying Aetna of the *Lori Piatt* claim] should have been disclosed by Charter to INA as part of the loss information supplied to INA in connection with Charter's pur-

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[53] *See* Attachments 16 & 17 to INA Nondisclosure Motion.

[54] *See supra* note 53.

chase of the insurance coverages . . . ." [55] The declaration of Clifton E. Harrison, an INA underwriter who was involved in the negotiation of plaintiffs' policies, states: "Any reasonable insurer would have considered the dioxin contamination and resulting lawsuits material to a decision to provide general liability insurance to Charter." [56]

Plaintiffs challenge the accuracy and objectivity of the testimony offered by INA. They attack the affidavit testimony of their former risk manager, Howard Tyrrell, as inconsistent with his prior actions as an employee of plaintiffs. The declaration testimony of INA underwriter Clifton Harrison is characterized as opinion evidence that is biased and not credible.

The court notes that evidence of the materiality of the undisclosed claims is not enough to show that plaintiffs' closing assertion was a misrepresentation. INA must also show that plaintiffs' knew that this information was material to its consideration of their insurance application. The testimonial evidence offered by INA raises a question of fact whether plaintiffs knew or should have known that this information was material. It is not sufficient, however, for the court to reach this conclusion as a matter of law. *Cf. Wilmington Trust Co. v. Manufacturers Life Insurance Co.*, 624 F.2d 707, 709 (5th Cir. 1980) (prospective impeachment of movant's evidence, without more, found sufficient to preclude summary judgment); *Edler v. United States*, 761 F.2d 807, 809 (D.C. Cir. 1985) (summary judgment inappropriate where fact issues present credibility judgments that should be made only after hearing witnesses in open court).

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[55] Attachment 12 to INA Nondisclosure Motion at ¶ 4 (Feb. 12, 1987).

[56] Attachment 15 to INA Nondisclosure Motion at ¶ 9 (Mar. 12, 1986).

The competing assertions of INA and plaintiffs reveal a question of fact, precluding summary judgment, as the evidence is insufficient for the court to find as a matter of law that plaintiffs knew the early claims information to be material.

IV. *U.S. Fire Excess Policies*

U.S. Fire requests summary judgment declaring it has no duty to defend or indemnify plaintiffs under its excess policies because of material misrepresentations by plaintiffs in applying for coverage under the policies. Like INA, U.S. Fire alleges misrepresentations in plaintiffs' failure to disclose the first series of dioxin claims in response to question #14 on its applications: "State loss record during the past five years specifying (a) full details of all claims (whether insured or not) in excess of $10,000 . . . ." [57]

This same nondisclosure is said to be the source of further misrepresentation springing from the concluding statement contained in plaintiffs' applications: "We know of no other relevant facts which might affect underwriter's judgment when considering this application." *Id.*

U.S. Fire's arguments track those of INA, discussed above, in asserting that plaintiffs' attempts to secure coverage from its 1975-1979 insurers indicates their expectation that these claims would impact these policy years and was material to U.S. Fire's consideration of their application for future coverage.[58]

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[57] *See* Attachments 2 & 3 to Amended Motion of U.S. Fire Insurance Company for Summary Judgment ("U.S. Amended Nondisclosure Motion").

[58] In addition to the testimony offered by INA, U.S. Fire cites the declaration of David L. Mayer, Jr., an insurance broker who was involved in the negotiation of plaintiffs' policies with U.S. Fire, in which he stated "I believe, based upon my 37 years in the industry, typical in the industry that, any claims or losses potentially affecting those policy years [1975-1979] would be disclosed in re-

Without repeating here the analysis set forth above in the discussion of INA claims regarding its excess policies, the court concludes that a question of fact remains as to whether plaintiffs' response or closing affirmation constitute misrepresentations. Plaintiffs dispute U.S. Fire's contention that question #14 requested all claims that were expected to impact the 1975-1979 policies. Plaintiffs also dispute that they believed these claims to be material to U.S. Fire's assessment of their insurance applications.

These questions are not to be resolved here by summary judgment, but must await further fact-finding at trial. Summary judgment not being available, the court will not address the requirement of materiality, which U.S. Fire must also establish at trial in order to avoid its policy obligations on grounds of nondisclosure.

V. *Summary*

The motions of INA and U.S. Fire for summary judgment on grounds of nondisclosure are denied.

3. *NOTICE*

Eight excess insurers have filed motions [59] for summary judgment on the grounds that plaintiffs failed to timely notify them of Bliss' activities and the damage and claims that resulted from it, as required under their policies. Defendants' policies cover the years 1972, 1975 and 1977. Each policy contains a provision which requires plaintiffs

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sponse to [question #14]. Attachment 1 to U.S. Fire Amended Nondisclosure Motion at ¶ 5.

[59] Six excess carriers have filed a joint motion: American Home, Lexington, ISOP, Employers Commercial Union Insurance Company (Employers Commercial Union), Continental Casualty Company (CNA) and North Star Reinsurance Corporation (North Star). Two other excess insurers, First State Insurance Company (First State) and Harbor, have filed separate motions incorporating the arguments of the main defendants' motion.

to notify their insurer as soon as practicable after learning of an act or omission which involves injuries or damages which they reasonably conclude are likely to involve the insurer's policy.

Defendants assert that they were first notified of Bliss' activities, and claims springing from it, in 1983. Defendants argue that prior to 1983 plaintiffs knew or should have known that Bliss' spraying involved injuries and damages likely to involve their policies. Consequently, defendants argue, plaintiffs have failed to satisfy the notice requirement of their policies, causing prejudice in their exposure to future claims as well as their ability to defend against them.

Defendants also note that their policies covering the 1972 policy year contain a so-called "no action" provision, which these defendants argue precludes coverage where the insured fails to satisfy all the conditions precedent set out in the policy, including the requirement of providing timely notice of occurrences implicating the policy.

Plaintiffs maintain that the notice they provided to defendants was reasonable under the circumstances and so satisfies the requirements of the policy provisions. They do not dispute that defendants actually first received notice of Bliss' activities, and resulting claims, in 1983. This notice was reasonable, plaintiffs contend, because it was only at this point that they reasonably believed Bliss' activities involved injuries that were likely to exceed the primary coverage.

Plaintiffs explain that throughout the 1970's and early 1980's they believed that Bliss' sprayings had been limited to two stables and that the claims resulting from this exposure would not exhaust the underlying primary policies. Plaintiffs insist that prior to 1983, they did not, nor reasonably could they have, anticipated the subsequent series of claims that have been filed, and which have involved these defendants' policies.

I. *Choice of Law*

The court has indicated above that issues in this case that require the interpretation of insurance policies will ordinarily be decided according to Missouri law.[60] The notice provision at issue here requires that defendant insurance companies be kept informed of occurrences involving injuries and damage which are likely to involve the defendants' policies. The relevant acts, as well as the injuries and damage that have resulted, all have taken place in Missouri. The resolution of this issue, moreover, may determine whether coverage is available to compensate Missouri citizens who may have been harmed by these events. The court finds that Missouri has the most substantial interest in having its law apply to the issue of whether plaintiffs have complied with the notice provisions of defendants' policies.[61]

II. *Factual Background*

A. *The Policies*

Defendants' excess insurance policies cover the years 1972, 1975 and 1977.[62] Although there are some differ-

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[60] *See supra* section (Waiver of Defenses) part II (Choice of Law Principles).

[61] Plaintiffs agree that Missouri law governs this issue. Defendants agree that were a choice of law analysis necessary, Missouri law should apply, but argue that there is no conflict between the law of Missouri and the other interested states. Defendants do concede, however, that on the issue of whether prejudice is required for there to be a material breach of the notice provision, Missouri law departs from that of many other states, including states on whose precedent these defendants would rely. *See* Annotation, *Modern Status of Rules Requiring Liability Insurer to Show Prejudice to Escape Liability Because of Insured's Failure or Delay in Giving Notice of Accident or Claim, or in Forwarding Suit Papers*, 32 A.L.R. 4th 141 (1984).

[62] A total of eight policies covering 1972 were issued by American Home, ISOP, CNA, North Star, Employers Commercial Union

ences in the language of the notice provisions of these various policies, the following provision is representative for purposes of this motion:

> 6. Insured's Duties in the Event of Occurrence; Claim or Suit;
>
> (a) Whenever the insured has information from which it is reasonable to conclude that an act or omission involves injuries or damages which are likely to involve this policy, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable. Failure to notify the company of any act or omission which at the time of its happening did not appear to involve this policy, but which at a later date would appear to give rise to claims hereunder, shall not prejudice such claims. . . .[63]

Several of the policies also contained the following two provisions:

> (b) If a claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons,

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and First State. At least part of 1975 was covered under three policies issued by American Home, ISOP and Lexington. Harbor issued one policy covering 1977.

[63] CNA policy number RDU 922936. The 1972 policies of American Home, Employers Commercial Union and North Star followed the terms and conditions of this policy.

Harbor's policy designated Swett & Crawford, then an affiliate of Harbor, as its agent to receive notice of occurrences which were likely to involve its policy.

or other process received by him or his representative.[64]

* * *

7. Action Against Company: No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy.[65]

The 1972 policies were purchased by plaintiffs through the Charter Insurance Agency (Charter Insurance), a retail broker, which obtained the coverage through The London Agency, Inc., a wholesale broker, which in turn dealt directly with defendant insurers. The 1975 and 1977 policies were obtained through retail broker Marsh & McLennan, which contacted defendant insurers directly.

Although plaintiffs do not dispute defendants' claim that they did not receive notice of Bliss' activities or the first series of dioxin-related claims prior to 1983, plaintiffs assert that they provided all of these defendants with notice, through their insurance brokers, for two of the five claims filed in the 1970's.[66] Defendants state that

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[64] The court understands this subpart (b), requiring immediate notice of claims filed, to incorporate the limitation expressed in subpart (a) that it applies to cases "likely to involve this policy." If this provision was read in isolation and applied literally, the insured would be under a continual obligation to advise new and long-past insurers of every new claim that is filed regardless of its relation to the coverage provided, a result clearly not intended by the parties.

[65] CNA policy number RDU 922936.

[66] Plaintiffs claim to have provided notice to all of these defendants of the *Lori Piatt* claim, which was served on IPC on November 7, 1979, through Charter Insurance and Marsh & McLennan on January 2, 1980. Plaintiffs indicate at one point that they notified all of these defendants of the *Patricia Drinkard* claim, which was served on IPC on August 10, 1978, through Charter Insurance and Marsh & McLennan on September 14, 1978. At other times, however, plaintiffs suggest that they requested the excess insurers for 1971, 1972 and 1974 to be notified. *Compare* Plaintiffs' 108(h) for Notice Motion at II, ¶ 28 *with Id.* at I, ¶ 104. Plaintiffs state that

they began receiving notification of certain of the second series of dioxin-related claims during the first six months of 1983.

The parties agree that it was and is the custom in the insurance industry for notification of claims and occurrences to be made through the same chain of communication by which the insurance was purchased. The insured notifies the retail broker, who in turn notifies the wholesale broker, who finally notifies the insurer.

B. *The Spraying of Dioxin-Contaminated Waste Oil*

In the early 1970's, plaintiffs were engaged in the business of terminaling and marketing petrochemicals in Missouri. In late 1970 or early 1971, John Lee, an officer of IPC customer Northeastern Pharmaceutical & Chemical Company (NEPACCO), approached Bud von Gerichten, the IPC salesman in charge of the NEPACCO account, about obtaining assistance in disposing of waste generated in NEPACCO's manufacturing process. In response to this inquiry, IPC's district manager Greg Browne contacted Russell Bliss to see if he could dispose of the NEPACCO waste.

NEPACCO had a plant in Verona, Missouri at which it produced certain chemical products, including hexachlorophene (HCP). The manufacture of HCP left a

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they notified defendants whose policies covered 1972 of the *Jerry Drinkard* claim, which was served on IPC on October 17, 1975, through Charter Insurance on October 27, 1975.

Defendants acknowledge that plaintiffs notified Marsh & McLennan of the *Patricia Drinkard* and *Lori Piatt* claims. They refer to plaintiffs as "allegedly" notifying Charter Insurance of these claims, as well as the *Jerry Drinkard* claim, presumably because Charter Insurance's records for this time period no longer exist. In or about 1980, Charter Insurance was purchased by Wilson Financial Corporation and became Whilden & Associates. Following its policy of destroying documents from more than two years past, Whilden & Associates destroyed all of Charter Insurance's pre-1980 records.

by-product, referred to by NEPACCO as "still bottoms," which was collected in a holding tank at the Verona plant. Although plaintiffs deny that these still bottoms contained dioxin,[67] Patrick Phillips, who participated in the investigation by officials of the federal Center for Disease Control (CDC) and the State of Missouri (Missouri) into the dioxin situation, has testified that chemical testing of samples from the still bottoms revealed "2,3,7,8 TCDD", an abbreviation for a form of dioxin.[68]

The parties are in dispute over the extent of IPC's knowledge in 1971 about the waste and what Bliss would do with it. Defendants allege that plaintiffs were told the waste was very hazardous, and received samples of it for analysis. Plaintiffs acknowledge receiving samples of the still bottoms, which they say they provided to Bliss. Plaintiffs state that they understood the waste material to be "hot," or acid-like, and that it could burn skin on contact, but not that it contained dioxin.

Defendants also contend plaintiffs told them that Bliss intended to mix the NEPACCO waste with other waste oils and spread it on farm-to-market roads to suppress dust. Plaintiffs maintain that Bliss said he would dispose of the waste at a disposal site that accepted atomic waste near Rolla, Missouri.

The parties agree that on five occasions from February to October 1971, IPC contacted Bliss on behalf of NEPACCO and requested that he pick up accumulated waste from the Verona plant. From these pick-ups, Bliss

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[67] Plaintiffs' Rule 108(h) Statement in Response to Certain Defendants' Rule 108(h) Statements in Support of their Motions for Summary Judgment Based on the Application to this Case of Pollution Exclusion Provisions Contained in their Policies, part IV, ¶ 2 (Plaintiffs' 108(h) for Application of Pollution Exclusion Motion).

[68] Appendix II to Plaintiffs' Rule 108(h) Statement in Opposition to Certain Defendants' Motion for Summary Judgment on the Notice Issue, Tab 2 at 60 (Nov. 13, 1986 deposition of Patrick Phillips, D.V.M.) (Appendix # to Plaintiffs' 108(h) for Notice Motion)

hauled away approximately 18,500 gallons of NEPACCO waste. On each occasion, IPC paid Bliss and billed NEPACCO for this service.

It is also undisputed that Bliss mixed the NEPACCO waste with other waste oil stored on his property in Frontenac, Missouri, and used at least some of it to spray for dust control. Plaintiffs indicate that Bliss tested the oil, by tasting and burning it, to determine its quality for sale to refineries.[69] Bliss described the oil sample as "a reputable used oil." [70]

Plaintiffs contend further that Bliss kept all or most of the "good oil" he collected from various sources, including the NEPACCO waste oil, in the "B-1 tank" at Frontenac.[71] From this tank, plaintiffs state, Bliss sold 85-95% of the oil to refineries and used no more than 10% for spraying on roads and horse arenas, as well as his own farm, to settle dust. Plaintiffs assert furthermore, that during 1971, Bliss used less than 1% of this oil for spraying.[72]

Bliss is reported to have given CDC the names of 29 stables he had oiled in recent years and the dates on which they had been sprayed. Seven stables were listed as having been sprayed during the February to October 1971 period. Of these, Bliss is said to have identified six stables, in addition to his own, that he considered most likely to have been sprayed with oil from a similar one-time source in the summer of 1971: Bubbling Springs Ranch, Timberline Stables, Shenandoah Arena, Vatterott's Arena, Mental Health Show and Bill Kazyak.[73]

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[69] Plaintiffs 108(h) for Application of Pollution Exclusion Motion, ¶ 33 (citations omitted).

[70] *Id.* (quoting Feb. 4, 1983 deposition of Russell Bliss at 29).

[71] *Id.* at ¶ 46, 47.

[72] *Id.* at ¶ 48.

[73] Appendix I to Plaintiffs' 108(h) for Notice Motion, Tab 12 (Notes of Aug. 12, 1974 CDC interview with Russell Bliss).

The September 1973 report of Hartford insurance investigator Patti Riley reflects a statement by Bliss that he regularly oiled 22 stables.[74] The earlier report of a Hartford field claims representative, Marion Yaakub, reports Bliss' identification of eight stables, "as well as many others" not identified, that he sprayed in June 1971. Yaakub's list includes three of the six stables which CDC's notes indicate were pinpointed by Bliss. It also includes five others not identified to CDC as having been sprayed during this time period: Emerald View Stables, Boy's Town Horse Show, High Trails, Green Felder State Park and the St. Louis Police Department Arena.[75] The entire Hartford file was provided to Tweedie Fisher, an attorney retained by Travelers and Hartford to defend IPC in the *Jerry Drinkard* case, in November 1975.[76]

C. *The Claims*

In a September 1974 telephone call, Russell Bliss told IPC district manager Greg Browne that a lawsuit had been filed against Bliss alleging that his spraying of a horse arena had caused the death of 25-30 horses and the illness of two children. Browne had also been called by Drs. Carter and Phillips on behalf of the Center for Disease Control during the past two weeks, concerning Bliss' hauling of NEPACCO waste, but had not yet spoken to them personally.[77] Browne related this information to Kirk Baker, an in-house attorney for Charter International Oil Company (CIOC).

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[74] Appendix I to Plaintiffs' 108(h) for Notice Motion, Tab 53 (The index to Appendix I indicates incorrectly that this document appears at Tab 52; some other documents also appear at the Tab following the number indicated in the index).

[75] Appendix I to Plaintiffs' 108(h) for Notice Motion, Tab 51.

[76] Appendix I to Plaintiffs' 108(h) for Notice Motion, Tab 58.

[77] Appendix II to Plaintiffs' 108(h) for Notice Motion, Tab 24 (Transcript of Sept. 10, 1974 telephone conversation between Greg Browne and Kirk Baker).

On September 16, 1974, Browne sent a memorandum to Baker summarizing his recollection of IPC's dealings with Bliss and NEPACCO about waste disposal. Browne described the terms on which Bliss had hauled 18,500 gallons of NEPACCO's waste, reported Bliss's statement that he had subsequently mixed the NEPACCO waste with other oil and sprayed it on roads and horse arenas, and recounted the inquiries from the CDC and his conversations with Baker. Also attached to the memo was an article from *Drug Journal* which stated that the CDC had identified dioxin as responsible for the death of numerous animals and the illness of two young girls in Missouri, which had been puzzling investigators for three years.

The article reported that dioxin had been mixed with oil and sprayed on four horse arenas. 35 horses were reported to have died and one of the girls was said to have been hospitalized. It was noted further that this was believed by toxicologists "to be the first time dioxin has been implicated in animal deaths and injury to humans outside of herbicide manufacturing plants, although it has been suspected in some field cases." Dioxin was also said to be suspected of causing birth defects in children exposed to Agent Orange in South Vietnam. The memo indicated that copies were to go to three other officials of plaintiffs' organizations: Bill Simmons, CIOC regional sales manager; and Earl Holman, manager of CIOC's tax and insurance department; and C.G. McDaniel.

Baker sent a copy of Browne's memo, along with a transcript of their telephone conversation, to Jennings Hill, the insurance specialist at CIOC in Houston who handled IPC's insurance claims. Hill acknowledges that he read Browne's memo sometime that fall, and "presume[s]" that he read the accompanying article.[78] Baker also sent copies of this memo to Simmons and Charles Fitch, Technical Specialist at CIOC.

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[78] Appendix II to Plaintiffs' 108(h) for Notice Motion, Tab 11 at 159-67 (Nov. 4, 1986 deposition of Jennings Hill, Jr.).

The lawsuit that Browne had spoken to Bliss about, *Hampel v. Bliss*, was served on IPC on October 7, 1974. The plaintiffs in this suit, including Judy Piatt, the primary owner of Shenandoah Stables, claimed $601,375 (including $400,000 in punitive damages) for property damage and personal injury resulting from Bliss' sprayings at Shenandoah Stables. Plaintiffs state that they notified Travelers, their primary insurer for 1971, and requested broker Risk Controls, Inc. to notify their 1971 excess insurers.[79] Four other suits claiming damages from Bliss' waste oil spraying were filed in the succeeding five years.

Jerry Drinkard v. Hand was served on IPC on October 17, 1975, claiming $40,600 (including $20,300 in punitive damages). Plaintiffs sought compensation for property damage resulting from Bliss' spraying of Timberline stables in 1971. In October, 1975, plaintiffs notified Travelers and Hartford, their primary insurer for 1972.[80] Plaintiffs state that *Jerry Drinkad* was settled in 1978 fo $6,500 with both Travelers and Hartford contributing to the settlement.

Andrea Piatt v. Bliss was served on IPC on January 13, 1976, although plaintiffs knew in July of the previous year that this suit had been brought against Bliss. Plaintiffs, including Mrs. Piatt's daughter Andrea, claimed

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[79] Jennings Hill has stated that he placed Travelers on notice "[b]ecause the suit alleged that the horse damage and personal injury had occurred in 1971" and requested that excess insurers be notified "[b]ecause the plaintiffs sought damages of $601,375, which were in excess of the $500,000 limits of IPC's 1971 primary liability policy." Appendix V to Plaintiff's 108(h) for Notice Motion at ¶ 5. (July 29, 1987 Affidavit of Jennings Hill, Jr.) Hill stated further that it was his "general practice to provide notice to excess insurers when the demand exceeded the limits of the underlying primary policy or policies." *Id.* Plaintiffs report that Travelers settled the *Hampel* suit in 1976 for $117,500.

[80] Hill stated he notified Hartford as well as Travelers "because the suit alleged that horses were injured or died sometime in 1971 or 1972."

$125,000 (including $50,000 in punitive damages) for personal injuries resulting from Bliss' 1971 spraying of Shenandoah stables.

Plaintiffs alleged systemic poisoning, injuring Andrea Piatt's vital organs, circulatory system and nervous system. Plaintiffs notified Travelers and broker Alexander & Alexander on January 20, 1976.[81] *Andrea Piatt* settled on September 27, 1983 for $1,000,000.[82] $191,250 was paid by Travelers; $808,750 was paid by excess insurers Underwriters at Lloyd's, London (Lloyd's) and Stonewall Insurance Company (Stonewall).

IPC was served with *Patricia Drinkard v. IPC* on August 10, 1978. Plaintiffs, including the wife of Jerry Drinkard, claimed $1,300,000 (including $600,000 in punitive damages) for personal injuries from Bliss' spraying of Timberline stables in May 1971, but not discovered until 1974.

Plaintiffs indicate they notified Travelers and Hartford on August 15, 1978, and requested the brokers who placed their excess coverage for 1971 and 1972 to notify those excess carriers. On the advice of Travelers that "the discovery of loss would be the controlling date for insurance coverage,[83] plaintiffs notified Aetna, their primary insurer for 1974, on September 14, 1978. At one point, plaintiffs claim that they notified all of their excess insurers for 1972-1979 through Charter Insurance and Marsh and McLennan.[84] At other points, however, they indicate that only the excess insurers for the years 1971, 1972 and

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[81] Alexander & Alexander had succeeded Risk Controls, Inc., the broker that placed plaintiffs' excess insurance coverage for 1971.

[82] The *Andrea Piatt* claim settled at the same time and at the same amount as the *Lori Piatt* claim, served on IPC in 1979.

[83] Appendix I to Plaintiffs' 108(h) for Notice Motion, Tab 44 (Sept. 14, 1978 letter from Karl Meyer of Travelers to J.H. Hill, Jr. of CIOC).

[84] Plaintiffs' 108(h) for Notice Motion at II, ¶ 28, p. 76.

1974 were to be notified.[85] The *Patricia Drinkard* claim was settled on September 27, 1983 for $680,000. Travelers paid $498,000 while excess insurers Lloyd's and Stonewall picked up the remaining $182,000.

The last of the so-called "first series" of dioxin claims, *Lori Piatt v. IPC*, was served on IPC on November 7, 1979. The plaintiffs claimed $14,025,000 (including $10,000,000 in punitive damages) for bodily injuries to Lori Piatt, Andrea Piatt's sister, from Bliss' 1971 spraying of Shenandoah stables.

Plaintiffs state that on November 14, 1979 they notified Travelers and requested that Alexander & Alexander put their 1971 excess insurers on notice. At Travelers' suggestion, plaintiffs say they notified Hartford and Aetna as well, and requested Charter Insurance and Marsh & McLennan to notify their excess insurers for the period 1972-1979. The *Lori Piatt* case was settled on September 27, 1983 for $1,000,000. Travelers paid $191,250, while excess insurers Lloyd's and Stonewall contributed $808,750.

Jennings Hill has acknowledged that in the process of monitoring these suits in the 1970's, he learned of the possibility that dioxin might cause chloracne and cancer in humans.[86] Plaintiffs conducted no independent investigation into the extent of the sprayings, instead relying on Travelers, their 1971 insurer, to determine whether other areas had been sprayed beyond those that had come to their attention through claims.[87]

In June 1979 plaintiffs were provided with a copy of a book review discussing Thomas Whiteside's "The

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[85] *Id.* at I, ¶ 104.

[86] Appendix II to Plaintiffs' 108(h) for Notice Motion, Tab 11, at 170-71.

[87] Appendix II to Plaintiffs' 108(h) for Notice Motion, Tab 11 at 165, 183 (Nov. 4, 1986 deposition of Jennings Hill, Jr.).

Pendulum and The Toxic Cloud, the Course of Dioxin Contamination." The book attempted to track the effects of a 1976 chemical plant explosion that caused widespread dioxin exposure to the people of Seveso, Italy. Although Whiteside has been writing about the hazards of dioxin since 1970, the reviewer notes, he found that official records "do not show any increase in deaths, abortions, malformed children, or any other permanent damage to the people exposed to the dioxin cloud." [88]

On December 22, 1982, the State of Missouri published a lengthy report covering the history of the dioxin contamination. In 1976, Missouri had reexamined the dioxin sites previously tested and determined in 1982 that the presence of dioxin in the soil had not diminished as expected. *Vickers v. IPC*, the first of what came to be referred to as the "second series" of dioxin cases was filed in December 1982. During the first six months of 1983, defendants received notice of these claims and the acts that had given rise to them. It is for these claims that plaintiffs seek coverage under these defendant excess insurers' policies.

III. *Discussion*

As discussed above, each of plaintiffs' policies with these defendants required plaintiffs to notify its insurer as soon as they had reason to believe its policies were likely to be involved as a result of some act, omission or occurrence involving injuries or damage. The policies of these defendants, as excess insurers, do not provide coverage until the underlying primary coverage is exhausted. The lowest level of primary coverage underlying any of these defendants' policies is $500,000.

Whether plaintiffs materially breached their contractual obligations in not notifying these defendants of the dioxin spraying and injuries prior to 1983 will be judged,

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[88] Appendix I to Plaintiffs' 108(h) for Notice Motion, Tab 46.

under Missouri law, according to a standard of substantial compliance, which turns on the reasonableness of their conduct under all the circumstances. *Greer v. Zurich Ins. Co.*, 441 S.W.2d 15, 30-31 (Mo. 1969). In the ordinary case, this determination is for the finder of fact. *Id.* at 31-32.

Prejudice to the defendants from delay in receiving this notice is one factor to be considered by the fact finder in determining whether a breach has occurred. *Id.* Actual prejudice will not be presumed from mere delay, however. *Katz Drug Co. v. Commercial Standard Ins. Co.*, 647 S.W.2d 831, 836 (Mo. Ct. App. 1983). An insured generally will not be barred from recovery due to a failure immediately to notify its insurer of a loss, unless the insurer has been prejudiced or the policy contains a forfeiture clause. *Id.*

The "no action" clauses included in certain defendants' policies, which these defendants contend relieve them of any obligations under the contract, are not entitled to such a broad reading under Missouri law. *See Greer*, 441 S.W. 2d at 31 ("forfeitures are never permitted unless the right thereto is clearly established."); *Western Cas. & Surety Co. v. Coleman*, 186 F.2d 40, 43-44 (8th Cir. 1950) (Under Missouri law, "failure of an insured to give notice of an accident will not defeat his rights under a liability policy unless it contains a provision for a forfeiture in that event or unless the insurer proves that the failure resulted in prejudice to it;" "no action clause" is not forfeiture clause). These provisions will be "construed mostly strongly against the insurance carrier[s]." *Greer*, 441 S.W.2d at 31.

The court notes that plaintiffs' determination of whether they reasonably were required to notify these defendants of the dioxin spraying and damage involves their judgment on several elements: (1) whether future claims arising from the spraying were likely to be made, (2) whether such claims were likely to allege injuries or

damage in excess of the underlying primary policy amount (at least $500,000); and (3) whether such claims were likely to allege injury or damage in the policy years 1972, 1975 or 1977.

The court's analysis will examine the state of plaintiffs' knowledge, and the reasonableness of its expectations on these elements at three significant points during the period 1971 through 1983. In order for the court to grant summary judgment for a defendant at any time during this period, it must be clear as a matter of law, drawing all inferences in favor of the plaintiffs, that plaintiffs should reasonably have concluded that Bliss' spraying involved injuries that were likely to involve that defendant's policies.

Defendants argue that plaintiffs should have provided notice of Bliss' spraying in 1971 on the basis that they knew he had hauled 18,500 gallons of dioxin waste from NEPACCO and intended to mix it with other waste oil to spray it as a dust suppressant on roads in Missouri. Plaintiffs dispute that they knew the waste contained dioxin and that Bliss intended to spray it to control dust. In light of the conflicting evidence presented by parties, the court is unable to say as a matter of law that plaintiffs had sufficient reason to notify these defendants in the spraying, in 1971. Exactly what plaintiffs knew in 1971 about the nature of the NEPACCO waste, and how Bliss would dispose of it, are factual questions to be decided at trial.

In 1974, defendants note, substantially more information was available to plaintiffs. Bliss told IPC he had sprayed the NEPACCO waste on roads and horse stables. Plaintiffs were aware that Bliss' sprayings were suspected in the deaths of numerous horses and the illnesses of two young girls, one of whom was hospitalized. They were contacted by the Center for Disease Control about Bliss' hauling and spraying of NEPACCO waste at horse arenas. Moreover, *Hampel v. Bliss*, the first of the dioxin

claims was filed, seeking $201,375 compensation for the value of the horses that had died at Shenandoah Stables, as well as $400,000 in punitive damages. By the fall of 1975, the *Jerry Drinkard* case also put plaintiffs on notice that injuries from the dioxin spraying might not be limited to 1971 and could implicate policies for future years as well. By that time plaintiffs were also aware that Andrea Piatt had sued Bliss and that it was likely they would be served as well.

In response to *Hampel*, plaintiffs state that they notified Travelers, their primary insurer for 1971, as well as their 1971 excess insurers (through broker Risk Controls), because its allegations centered on 1971. Plaintiffs take the position that they had no basis to believe the excess policies covering 1972, 1975 and 1977 would be involved as a result of injuries from Bliss' spraying. The Shenandoah claims did not extend beyond 1971, plaintiffs assert, nor did they suggest the potential for future claims involving other policies. At this point they believed the risk of injuries and damage arising out of Bliss' sprayings was very limited.

Jerry Drinkard, of course, alleged property damage in both 1971 and 1972. Although plaintiffs indicate they attempted to put defendant excess insurers with 1972 policies on notice through Charter Insurance of the *Jerry Drinkard* claim, the court does not find as a matter of law that they were required to. Although the suit alleged injuries in 1972, the damages claimed did not approach the limits of the underlying primary policy.

Despite the 1974 memorandum of IPC's Greg Browne, which included a *Drug Journal* article reporting that four arenas had been sprayed, plaintiffs did not investigate how many other places Bliss had sprayed or whether other, possibly related injuries had occurred. Plaintiffs state that this effort was carried out by Travelers on their behalf, in connection with the defense of the *Hampel* suit.

The notes of a CDC interview with Bliss in August of 1974 suggest, however, that had either plaintiffs or Travelers asked Bliss, he would have told them he regularly sprayed as many as 29 stables, and that six stables were particularly likely to have been sprayed from the same one-time source in the summer of 1971.[89] Plaintiffs cannot avoid their obligation, pursuant to contractual notice requirements, to exercise due diligence in investigating incidents that reasonably suggest the likelihood of injuries and damage that will involve their insurance policies. *See Harris v. American Motorist Ins. Co.*, 126 So.2d 870, 873-74 (Miss. 1961) ("When an insured has knowledge of an accident involving the coverage under his insurance contract, it is his duty to exercise reasonable care, due diligence as a reasonable and prudent man, to acquire information about the accident, so that he may be readily informed about claims out of which damage may arise." (citations omitted)); *Empire City Subway Company v. Greater New York Mutual Ins. Co.*, 35 N.Y.2d 8, 358 N.Y.S.2d 691, 693 (1974) (insured "required to exercise reasonable care and diligence to ascertain the facts about the alleged incident, since at [] had notice that an accident had occurred." (citation omitted); *Commercial Cas. Ins. Co. v. Fruin-Colnon Contracting Co.*, 32 F.2d 425, 431 (8th Cir. 1929) (facts found sufficient to require prompt investigation).

Plaintiffs' claim that they delegated that responsibility to one of their insurance carriers does not prevent them from being charged with the knowledge that a competent investigation would surely reveal. *See Farr v. Newman*, 18 A.D.2d 54, 238 N.Y.S.2d 204, 20-209 (N.Y. App. Div. 1963) (party to contract chargeable with his attorney's non-confidential knowledge and with information that reasonable inquiry would have developed), *aff'd* 14 N.Y.2d 183, 250 N.Y.S.2d 272, 275 (N.Y. 1964); *cf. Fruin-Colnon Contracting Co.*, 32 F.2d at 431 (notice to officer

[89] *See supra* note 16 and accompanying text.

or agent affects rights of corporations if within sphere of duty while attending to business of company); *Columbia Paper Stock Co. v. Fidelity & Cas. Co. of New York*, 104 Mo. App. 157, 78 S.W. 320, 323 (Mo. Ct. App. 1904) (corporation is "charged with notice of those facts in the knowledge of its agents, within the scope of the business entrusted to them; citations omitted). Nor does it relieve them of their responsibility to notify their other carriers of such information where called for under the policy.

Moreover, by November of 1975, Tweedie Fisher, the attorney retained by Travelers and Hartford to defend plaintiffs in the *Jerry Drinkard* case, had the entire Hartford file containing the reports of Riley and Yaakub, further indicating that Bliss had sprayed a number of other stables during the relevant period.

Even if plaintiffs were aware by 1975 that Bliss had identified six to twelve arenas as likely to have been sprayed with oil containing the NEPACCO waste, unless the defendants can show that plaintiffs also should have known these sites were likely to give rise to claims involving their policies, the court cannot conclude as a matter of law that they acted unreasonably.

Plaintiffs argue that the absence of claims from sites other than Shenandoah or Timberline during the 1971 to 1974 period led them to believe that new claims were not likely to arise from other sites. Both the CDC and the State of Missouri had investigated the matter, and reports of the injuries at Shenandoah and Timberline had been reported in the media. Plaintiffs claim that although they knew dioxin was suspected of causing long-term health risks, such as cancer, they believed a harmful level of dioxin exposure would also produce some immediate symptoms, and so would have been known to them by 1974.

New injuries also seemed unlikely, plaintiffs assert, because like many others they believed that the toxicity of

dioxin diminished over time. Defendants have not introduced sufficient evidence to show that plaintiffs' belief—that there was a low likelihood of latent or future injuries at other sites—was unreasonable as a matter of law. The court concludes that the reasonableness of plaintiffs' judgments as of 1974-75 must be tested at trial.

By 1979, defendants argue further, additional information was available which should have caused plaintiffs to notify them. The *Patricia Drinkard* case was served on plaintiffs in 1979, alleging personal injuries discovered in 1974 that resulted from Bliss' 1971 spraying. This case provided plaintiffs with reason to anticipate that future claims could allege injuries in the years covered by these defendants' policies and that these claims could allege personal injuries serious enough to exceed the primary coverage. In addition, the filing of *Lori Piatt v. IPC* in 1979, seeking over $14 million in compensatory and punitive damages, made plaintiffs aware of the potential magnitude of damages that future dioxin claims might allege.

After the filing of *Patricia Drinkard* and *Lori Piatt*, plaintiffs clearly had good reason to see *some* potential for future claims which might involve these defendants' policies. Although plaintiffs argue that they had anticipated the *Lori Piatt* claim, and reasonably believed it to be the last of the dioxin claims that would be filed as a result of Bliss' sprayings, it is not clear that this conclusion is reasonable, even if plaintiffs' narrow focus on Shenandoah and Timberline is accepted. Future claims for personal injuries might come from a number of sources that had been present at the Shenandoah and Timberline stables since 1971, such as Judy Piatt of Shenandoah Stables, or Jerry Drinkard of Timberline. Plaintiffs' belief that dioxin decayed relatively rapidly provides support to their position, however, especially since eight years had passed since Bliss' spraying.

Despite the strong indications that some risk of future dioxin claims existed, it is not clear that even from 1979 to the end of 1982 plaintiffs had reason to believe that a claim possessing all of the relevant characteristics was "likely" to be filed, as required under the policies. Given the disputed state of the evidence, the court concludes that this judgment is a question of fact to be decided at trial.

Defendants do not argue that plaintiffs learned any other material information from 1979 until the end of 1982. Defendants began receiving notice of the second series of claims during the first six months of 1983.

In determining whether a material breach has occurred, under Missouri law the finder of fact must also consider whether the insurer has been prejudiced by any delay in receiving notice. Defendants claim prejudice to their ability (1) to monitor the handling and settlement of the first series of claims, (2) to assure that pertinent witnesses (some of whom are now deceased) were interviewed, and (3) recommend action to prevent future claims from invading their layers of excess coverage. Defendants cite *Ralston Purina Co. v. Home Ins. Co.*, 760 F.2d 897 (8th Cir. 1985), as approving the use of such "lost opportunity" evidence to show prejudice. *See id.* at 898. In *Ralston Purina*, however, the excess insured's prejudice related to its ability to investigate, monitor and settle the same claim it was being sued to provide coverage for, and which the excess insurer had not received notice of until two days after the trial had started. In that case at bar, defendants are being sued for coverage of claims that were filed in late 1982 and afterward, and for which notice was provided, beginning in early 1983. Defendants have not claimed any bar to their present investigation, monitoring and settlement of these claims, but focus on their lost opportunities to take steps in the 1970's and early 1980's to protect their present position with regard to these later claims.

The court notes that these defendants have had ample opportunity to investigate since receiving notice of the second series of claims starting in 1983. Although defendants had no opportunity to investigate in the 1970's, this case is substantially different from *Greer*, cited by the *Ralston Purina* court in that here substantial investigation was conducted by other insurers, the results of which are apparent in the record of this case. Defendants note that certain witnesses have passed away during the interim but do not suggest that the facts known to these witnesses were not thoroughly investigated by other insurers through affidavits, depositions and other means.

This case is also different from the situations in *Greer* and *Ralston Purina*, where the cases went to trial before notice was given to the relevant insurer, in that these defendant excess insurers have not been prevented by lack of notice from participating in the selection of trial counsel and negotiation for settlement.

Defendants also claim as prejudice the lost opportunity to recommend action to prevent future claims from involving their layers of excess coverage. They do not indicate what actions of this nature they have taken since receiving notification, or how these efforts have been prejudiced by any delay in notification. Nor do defendants cite any case in which lost opportunities as remote and speculative as those suggested here have been found to constitute prejudice sufficient to relieve an insurer of its obligations under the policy. Although defendants will have another opportunity to show prejudice at trial, the court is unable to find such prejudice as a matter of law.

IV. *Summary*

Defendants motions for summary judgment on the ground that plaintiffs failed to provide timely notice of occurrence are denied.

4. *NAMED INSURED*

During the policy years 1971 through 1975, defendant excess carriers provided excess umbrella liability coverage to plaintiffs Independent Petrochemical Company (IPC) and Charter Oil Company (COC). Plaintiffs IPC, COC and The Charter Company (TCC) brought this suit to obtain a declaration that defendants are obligated to defend and indemnify them for certain dioxin-related claims once the underlying policies are exhausted. Certain defendant excess insurers now move for partial summary judgment against plaintiff TCC.[90] They contend that TCC is not a named insured, nor is it otherwise covered, under their policies with IPC and COC. This is an issue of insurance contract interpretation and shall be controlled by the law of Missouri.[91]

I. *TCC as an "Affiliated" or "Associated" Company of IPC or COC*

Plaintiffs make several arguments in support of their claim that TCC is covered under the policies at issue. First, plaintiffs note that 7 out of the 14 policies at issue here include coverage for "affiliated" and/or "associated" companies of IPC and COC.[92]

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[90] One motion was filed by American Home Assurance Company, The Insurance Company of the State of Pennsylvania, and Lexington Insurance Company. A second motion, joining the motion of these defendants, was filed by American Employers' Insurance Company and Employers Commercial Union Insurance Company. A third motion, also joining the first, was filed by American Reinsurance Company, North Star Reinsurance Company, Continental Casualty Company and Unigard Security Insurance Company.

[91] *See supra* section 1 (Waiver of Defenses) part II (Choice of Law Principles). The parties take no position on the question of what law is applicable, and have cited no case from any jurisdiction that is on all fours here.

[92] Two examples of such policies define "named insured" as follows: (1) "Charter Oil Company and Subsidiary, Affiliated and Associated Companies," and (2) "Charter Oil including all its subsidiary and/or affiliated companies."

Since TCC owns all of IPC's stock, they reason, TCC is both affiliated and associated with IPC and is covered under the policy. This "common usage" interpretation of these terms is supported, plaintiffs claim, by Congress' comparable use of the phrase "affiliated company" in the Investment Company Act of 1940. At a minimum, plaintiffs argue, the terms are ambiguous and so must be construed in favor of the insured. *See Heshion Motors, Inc. v. Western International Hotels*, 600 S.W.2d 526, 537 (Mo. Ct. App. 1980).

Defendants argue for a narrower construction of the terms "affiliated" and "associated," reading them as referring to companies in which IPC or COC has an ownership interest. According to defendants, this interpretation follows from the context in which these terms are used. At its most inclusive, defendants argue, the policy language restricts the named insured to "Charter Oil Company, all its subsidiary and/or affiliated companies . . . and any other interest principally owed by [a listed company.]"

Defendants read "and/or affiliated companies" followed by "and any *other* interest principally owned" to include only companies in which IPC or COC had an ownership interest. This language is intended to include subsidiaries, defendants explain, and those companies in which IPC or COC had an ownership interest but "which had not been formally brought into the COC fold." This interpretation is supported by the fact that all the companies listed in the endorsements defining "named insured" were actually subsidiaries of Charter Oil Company. The Charter Company, by comparison, is not listed in any of these endorsements.

The parties do not dispute the underlying facts of the policies' existence or language. Defendants' motion for summary judgment cannot be granted, however, unless their pleadings have established as a matter of law that

TCC is not covered under the policies. Plaintiffs and defendants each have presented a reasonable interpretation of the meaning of the words "affiliated" and "associated" company as used in the policies. Dictionary definitions do not resolve the conflict between them. Where such an ambiguity exists, the court must construe the policy strictly against the insurer, who wrote the policy. *Heshion Motors*, 600 S.W.2d at 537. Those defendants whose policies include this language are not entitled as a matter of law to a judgment relieving them of their duty to defend TCC.

Two defendants[93] note that their policies do not contain the "affiliated" or "associated" company provisions, making this basis of coverage inapplicable to them. Plaintiffs do not dispute this claim. Each of these defendants' policies, however, contains a provision which insures stockholders acting within the scope of their duties, that plaintiffs argue establishes coverage for TCC. Whether TCC is covered under the "stockholder" provisions in these policies is addressed in part B below.

Defendants also argue that plaintiffs should not be allowed to disregard TCC's separate corporate existence from that of IPC and COC, in order to establish coverage here, while at the same time denying TCC's liability for the actions of its subsidiaries in the underlying suits. Defendants quote *Boswell v. May Centers, Inc.*, 669 S.W.2d 585, 586 (Mo. Ct. App. 1984): "It is totally incongruous and patently unjust to permit the parent to hide behind the shield of separate corporate identity when advantageous, but to disavow such separateness when it is not." Plaintiffs, however, argue that TCC does not deny its corporate relationship to IPC and COC. Rather, plaintiffs rely on TCC's "associated" and "affiliated" status to IPC and to COC, as a basis for the coverage claimed here.

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[93] American Employers' Insurance Company and Employers Commercial Union Insurance Company.

The court finds defendants' argument that equity should bar plaintiffs' claim for coverage based on TCC's "associated" and "affiliated" relationship to IPC and COC is unsupported by its reference to *Boswell*. The corporate defendants in *Boswell* sought to extend the application of the state's exclusive remedy rule for workers' compensation claims to bar the plaintiff from suing the subsidiary company after the parent company had settled the plaintiff's workers' compensation claim. In arguing that TCC is an "affiliated" or "associated" company, plaintiffs in this case have not sought to "pierce [TCC's] own corporate veil," as in *Boswell*, 669 S.W.2d at 586, but rely on the fact of their close but separate corporate status to support their argument. TCC does not deny liability in this action but seeks insurance protection—not as the "alter ego" of IPC or COC but as an "affiliated" or "associated" company.

II. *TCC as a Stockholder of COC*

Secondly, plaintiffs argue that TCC is covered as a stockholder of COC—a named insured on many of the policies, which in turn is a stockholder of IPC—a named insured on all of the policies. Plaintiffs cite language present or incorporated by reference in each of the policies that defines "persons insured" or "assured." A representative provision reads as follows:

> II. Persons Insured
>
> Each of the following is an insured under this insurance to the extent set forth below:
>
> . . .
>
> c) If the named insured is designated in the declarations as other than an individual, partnership or joint venture, the organization so designated and any executive officer, director or *stockholder thereof while acting within the scope of his duties as such;*

(emphasis added). Comparable language is included in provisions defining the "assured." Plaintiffs reason that since TCC is being sued in its capacity as a stockholder of COC, then it is covered under this provision. Plaintiffs cite *Western Casualty & Surety Co. v. Aponaug Mfg. Co.*, 197 F.2d 673 (5th Cir. 1952) and *McDonald v. Royal Globe Insurance Co.*, 413 So.2d 1046 (Ala. 1982) in support of their argument.

Several defendants[94] argue that the "stockholder" provision does not apply to TCC because, unlike the stockholders in the cases cited, TCC has not been sued for taking any action within the scope of its duties as a stockholder. Instead, defendants explain, TCC seeks to be protected because it is the "alter ego" of COC, which is the "alter ego" of IPC, a party whose actions are at issue in the underlying suits. The policies at issue here, they say, were not intended to insure against TCC's passive vicarious liability for the acts of its subsidiaries.

Defendants argue that finding coverage in this situation would expand coverage far beyond what was intended or reasonably could be expected under the language of the policy. Plaintiffs maintain, however, that since TCC is being sued because of its position as a stockholder, then for the purposes of this policy it is "acting" within the scope of its duties and is covered under this language.

Each side has suggested a reasonable interpretation of the "stockholder" provision. The cases cited by plaintiffs, *Western Casualty* and *McDonald*, offer some support for each interpretation but little help in deciding this issue. Both cases involved a stockholder whose actions gave rise to the litigation. Neither case, however, discusses the relative importance of the nature of the actions giving rise to the liability, as compared to the

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[94] American Home, American Re-Insurance, CNA, ISOP, Lexington, Northstar, and Unigard.

status of the actor as a stockholder, in establishing coverage under the policy.

Here, it is IPC whose actions have given rise to the underlying tort suits and triggered the policies' coverage. COC and TCC have been sued as well, because COC owns IPC and TCC owns COC. This is not a case in which a parent company or stockholder seeks coverage for liability unrelated to its stockholder status. The risk of liability through such actions by IPC was clearly the type of risk contemplated by the policies. *Cf. Lazarus v. Manufacturers Casualty Insurance Co.*, 267 F.2d 634, 637 (D.C. Cir. 1959) (focusing on nature of risk insured by policy in determining whether particular person covered). The question is whether the stockholder provision extends such coverage to TCC under these circumstances.

In the face of ambiguous policy language, the law of Missouri is well settled: "an insurance policy being a contract designed to furnish protection will, if reasonably possible, be interpreted so as to accomplish that object and not to defeat it, and, if terms of the contract are susceptible of two possible interpretations and there is room for construction, the provisions limiting or cutting down on the coverage of the policy, or avoiding liability therefor, will be construed most strongly against the insurer." *Brugnoni v. Maryland Casualty Co.*, 382 S.W.2d 707, 710-11 (Mo. 1964).

Here again, the parties do not dispute the existence of the relevant policy language but only its interpretation. The court must deny the remaining defendants' motions for summary judgment, then, as it is unable to conclude as a matter of law that TCC is not covered under the policies as a stockholder acting within the scope of its duties. Defendant American Employers' Insurance Company, an excess insurer whose policies did not contain the "affiliated" or "associated" company language, argues that TCC cannot establish coverage under its policies as a stockholder of COC since COC is not a

named insured under these policies. Although COC (and Signal Oil & Gas Co.) were originally listed as named insureds, later endorsements implicitly removed COC from coverage, this defendant asserts. Plaintiffs contest this conclusion, arguing for a different reading of the endorsements' language.

American Employers' policies 8500-490 and 8500-491 originally were to have provided insurance coverage to Charter Oil Company and Signal Oil & Gas Co. from October 26, 1970 to October 26, 1971; the policy period was later extended to January 1, 1972. Endorsement 5, effective Jan. 1, 1971, states "it is agreed that Item 1, Insured, is *amended to read* as follows: Charter International Oil Company" (emphasis added). Endorsement 6, effective October 26, 1970, states "IT IS HEREBY agreed that Item #1 of the Declarations, Named insured, is *amended to read* as follows: Charter International Oil Company, Super-Test Oil and Gas Co. Inc., Independent Petrochemical Corporation, Worth Oil Company Inc." (emphasis added).

Each of these endorsements, according to defendants, substitutes in its entirety the list of named insureds. The intention to substitute, rather than supplement, is reflected by the words "amended to read" and by the fact that endorsements 5 and 6 both included Charter International Oil Co., a repetition that would have been unnecessary if the endorsements were intended to list additional named insureds.

Defendants further support their interpretation of the phrase "amended to read" by contrasting it with the phrase "amended to include," used in endorsement 7. Endorsement 7, effective July 1, 1971, states "IT IS AGREED that Item 1, Insured, is *amended to include* the following: Charter Trading Company [Address]" emphasis added). Had endorsements 5 and 6 been intended only to add insureds, defendants contend, this "amended to include" language would have been used,

rather than the "amended to read" language that appears in them.

Plaintiffs claim that the phrase "amended to read" also can reasonably be read to indicate the addition of named insureds, rather than their substitution. The language is therefore ambiguous, according to plaintiffs, and must be construed against the insurer. The court, however, finds the plain meaning of these words to be clear and unambiguous. The word "amended" indicates that the content of the provision, defining named insured, is to be altered, although it does not suggest to what extent. The words "to read" mean that the alteration contains a complete description of the contents of the new named insured provision. The court does not believe that a reasonable reading of this language will support plaintiffs' interpretation. Nor do plaintiffs point to any facts or circumstances to support their unusual construction. This conclusion does not determine the question of TCC's coverage under the "stockholder" provision, however.

Even if COC is not considered to be a named insured, plaintiffs argue that TCC is still covered under defendant American Employers' policies as a second-tier stockholder of IPC. The court has already concluded that for purposes of this motion, the "stockholder" provisions of those policies that cover COC as a named insured can reasonably be interpreted as covering TCC as a stockholder of COC, precluding summary judgment for defendants where TCC's stockholder status is the underlying basis for TCC's asserted liability. Since TCC's potential liability springs from the same source—the actions of its subsidiary IPC—even where COC is not a named insured, it seems equally reasonable to read the "stockholder" provision to cover TCC as a stockholder of insured IPC through its subsidiary COC.

The court recognizes the separate corporate existence of COC as parent of IPC and subsidiary of TCC, and its

implications for tort and corporation law. The court does not believe, however, that the fact of this wholly owned corporate intermediary should destroy coverage for liability which is based entirely on the corporate relationship between these plaintiffs.

The *Boswell* case, cited by defendants on the issue of "affiliated" and "associated" companies, does not compel a different result. It is true that in effect, plaintiffs are trying to pierce the corporate veil that removes TCC from the status of first-tier stockholders of IPC. In *Boswell*, however, the defendant corporations were attempting to avoid the consequences of their chosen corporate form in order to take advantage of the workers' compensation exclusive-remedy rule and so avert tort liability they might otherwise be subject to. The *Boswell* court found this prospect "totally incongruous and patently unjust," because one of the primary reasons for establishing distinct corporate entities is to insulate each entity from liabiltiy based on the acts of the others. The *Boswell* court was clearly saying the defendants couldn't have it both ways.

This stark inequity is not present in this case. Separate corporate entities are not set up principally to gain insurable coverage, and so it is not similarly inequitable to read "stockholder" to include a second-tier stockholder such as TCC, and so to find coverage where the language of the policy reasonably provides it. TCC's efforts to avoid liability in the underlying suits, including arguments based on its distinct corporate status, present no conflict with this reasoning as they go to TCC's tort liability, not its insurance coverage.

No less than where TCC is the direct stockholder of named insured COC, the court concludes that where TCC is a second-tier stockholder of IPC through its ownership of COC, TCC can reasonably be considered a stockholder acting within the scope of its duties. American

Employers is not entitled to judgment releasing it from defending TCC.

III. *Summary*

The court has reviewed each of the defendants' two principal arguments for establishing as a matter of law that their policies do not insure TCC from liability in the underlying suits. Although two defendants, American Employers and Employers Commercial Union, established that their policies do not cover TCC as an "affiliated" or "associated" company, the policies of each can reasonably be read to cover TCC as a stockholder of IPC, COC, or both.

Although the parties do not contest the existence or language of the policies at issue, no defendant has established that it is entitled to judgment as a matter of law releasing it from the duty to defend The Charter Company in the underlying actions. Defendants' motions for summary judgment are denied.

5. *LIMITS OF LIABILITY*

Three defendants [95] have filed motions for partial summary judgment declaring that their policies limit the total amount of liability coverage available to plaintiffs. These insurers base their arguments on provisions titled "Limit of Liability" and "Limit(s) of Coverage," specifying aggregate annual amounts. Plaintiffs contend that these limits do not apply to all claims, however, but only restrict the total amount that can be paid on certain types of claims. The analysis below will examine individually the motions of these defendants—Unigard, North Star and American Re-Insurance.

I. *Choice of Law*

As the court has previously indicated, issues involving the interpretation of the defendants' policies generally

[95] Unigard, North Star and American Re-Insurance.

will be governed by Missouri law.[96] As the claims underlying this action have been brought by residents of Missouri, alleging damages arising out of activity taking place in Missouri, and since any limitations on the aggregate coverage available to plaintiffs here may affect the underlying claimants' ability to obtain compensation for their injuries, the court concludes that Missouri law controls the resolution of this issue.

II. *Unigard*

Unigard moves for partial summary judgment declaring that its policy number 1-0436 limits total potential liability to $25 million. Plaintiffs disagree, asserting that the aggregate limitation in Unigard's policy applies only to losses from products liability and occupational disease claims.

Unigard policy number 1-0436 states under the title "Declarations":

> Item 2.
>
> Limit of Liability—as Insuring Agreement II.
>
> | | |
> |---|---|
> | (a) Limit in all in respect of each occurrence | $25 MILLION |
> | (b) Limit in the aggregate for each annual period where applicable | $25 MILLION |
> | (c) Self Insured Retention | $25 MILLION |

Under "Insuring Agreements" the policy adds:

> II. LIMIT OF LIABILITY
>
> The Company [Unigard] shall only be liable for the ultimate net loss the excess of either

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[96] *See* section 1 (Waiver of Defenses) part II (Choice of Law Principles).

> (a) the limits of the underlying insurances as set out in the schedule in respect of each occurrence covered by said underlying insurances, o(sic)
>
> (b) the amount as set out in the declarations as the self-insured retention in respect of each occurrence not covered by said underlying insurances.
>
> (hereinafter called the "Underlying Limits");
>
> and then only up to a further sum as stated in Item 2(a) of the Declarations in all in respect of each occurrence—subject to a limit as stated in Item 2(b) of the Declarations in the aggregate for each annual period during the currency of this Policy, separately in respect of Products Liability and in respect of Personal Injury (fatal or non-fatal) by Occupational Disease sustained by any employees of the Assured.[97]

Plaintiffs argue that under this policy language, the $25 million aggregate limit applies only to claims for products liability and occupational disease, focusing on the following language: "subject to a limit . . . in the aggregate for each annual period . . ., separately in respect of Products Liability and in respect of Personal Injury . . . by Occupational Disease."

Unigard argues that this language limits annual aggregate coverage regardless of the type of claim. Under its theory, the paragraph highlighted above places limits on three categories of losses: (1) the maximum coverage available for any one occurrence, (2) the maximum coverage available for all claims, regardless of the number of occurrences, and (3) (a) the maximum coverage

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[97] Motion Of Unigard Security Insurance Company For Partial Summary Judgment On The Issue Of Applicable Limits Of Liability, Exhibit A (emphasis added).

available for all products liability claims, regardless of the number of occurrences, and (b) the maximum coverage available for all occupational disease claims, regardless of the number of occurrences. Unigard interprets the general aggregate limit as a final cap for all types of losses which prevents Unigard's liability from exceeding $25 million.

The court notes that the policy language, by itself, is amenable to different interpretations. Although Unigard's view is not implausible on its face, the court adopts plaintiffs' reading. First, the words "where applicable," contained in the policy's declaration setting $25 million as the "Limit in the aggregate for each annual period where applicable," would be superfluous if $25 million is the aggregate amount applied to all claims. Nor does Unigard offer an explanation for the apparent redundancy of setting separate aggregate levels of $25 million for specific types of claims, such as products liability, when total claims could not exceed that amount. These redundancies disappear under plaintiffs' reading of the phrase "subject to a limit . . . in the aggregate . . ." as dependent on the phrase that follows it—"separately in respect of Products Liability [and Occupational Disease claims]," and not as establishing a general aggregate limit.

Moreover, where policy language is sufficiently ambiguous to allow more than one reasonable interpretation, the court must adopt the reading most favorable to the insured. *Heshion Motors*, 600 S.W.2d at 537. Unigard's motion for summary judgment declaring that its policy number 1-0436 limits aggregate coverage for all claims to $25 million is denied.

III. *North Star*

North Star has filed a motion for partial summary judgment declaring that its potential policy coverage under its policy number NSX 10161 is limited to $2

million for all claims. Plaintiffs oppose the motion, asserting that the aggregate limit applies only to coverage for products liability and occupational disease claims. The relevant portions of North Star's policy are quoted below:

DECLARATIONS

* * *

Item 2. UNDERLYING INSURANCE

* * *

Item 3. LIMITS OF COVERAGE HEREUNDER:

$2,000,000 each occurrence and annual aggregate part of $10,000,000 each occurrence and annual aggregate in excess of underlying insurances as stated in Item 2 above.

* * *

REINSURING AGREEMENT

NOW THEREFORE this Certificate is to further indemnify the Reinsured against ultimate net loss arising out of the hazards covered and as defined in the underlying insurance but only up to an amount not exceeding the limit(s) shown in Item 3 of the Declarations.

* * *

CONDITIONS

EXCEPT AS MAY Be inconsistent with the above, the coverage provided by this Certificate shall follow the reinsuring agreements, conditions and exclusions of the underlying insurance, including any change by endorsements. The Reinsurer shall be notified of all such endorsements and copies thereof shall be furnished to the Reinsurer upon request.[98]

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[98] Certain Defendants' Motion For Summary Judgment On The Ground That Plaintiffs Failed To Provide Timely Notice Of Occurrence, Tab 6, Attachment A.

North Star argues that the policy language quoted above unambiguously limits aggregate coverage to $2 million regardless of the nature or number of claims. Plaintiffs contend, however, that the "conditions" language stating coverage "shall follow the reinsuring agreements, conditions and exclusions of the underlying insurance," alters the reading of North Star's "limits of coverage" language. Under plaintiffs' theory, the aggregate limit contained in the North Star policy applies only according to the terms of the underlying policies as to how *their* aggregate limits are to be applied.

Since plaintiffs assert that the underlying coverage of First State Insurance Company and British companies contains aggregate limits only for products liability and occupational disease claims, they conclude that North Star's aggregate limit applies only to these types of claims. It is not necessary to address whether plaintiffs' reading of the underlying policies is correct, as the court finds that the application of North Star's aggregate coverage limit is not controlled by the underlying policies.

The North Star policy states that its *coverage* shall follow the underlying insurance. The court understands this to mean that its policy insures against the same *risks* as the underlying policies, not that it provides the same *amounts* of coverage. The amount of coverage, whether per occurrence or in aggregate, is related primarily to the premium paid, not the terms of the underlying insurance.

The facts are not in dispute here and the court finds no ambiguity in the policy language at issue. North Star has shown, as a matter of law, that its policy contains an annual aggregate limit of coverage, applicable to all types of claims, of $2 million. North Star's Motion for Partial Summary Judgment declaring that its single policy NSX 10161, from January 1, 1972 to January 1, 1973, does not provide potential coverage in excess of $2 million is granted.

IV. *American Re-Insurance*

American Re-Insurance also moves for partial summary judgment declaring that its potential liability under its one-year [99] policy number M 0091884 is limited to $2.5 million for all claims. Plaintiffs oppose this motion also, asserting that this limitation in the policy applies only to certain types of claims not at issue here. The relevant language from the policy is quoted below:

DECLARATIONS

* * *

ITEM 4 UNDERLYING INSURANCE:

A) Lloyds and various companies; Policy No. LC 62737; Term 10-26-70 to 10-26-71; $10,000,000 each Occurrence and in the aggregate combined single limit in excess of $5,000,000 each Occurrence and in the aggregate combined single limit.

ITEM 5 LIMIT(S) OF COVERAGE HEREUNDER:

$2,500,000 (50%) part of $5,000,000 in excess of the limit shown in Item 4 above.

* * *

TERMS AND CONDITIONS

INSURING AGREEMENT

* * *

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[99] The policy was originally effective from October 26, 1970 to October 26, 1971. The expiration date of American Re-Insurance's policy M 0091884 was changed to January 1, 1972 by a later endorsement. The application of coverage limitations to this extension period is discussed *infra* at section 6 (Number of Policy Periods).

> 2. Except as may be inconsistent with this Certificate, the coverage provided by this Certificate shall follow the insuring agreements, conditions and exclusions of the underlying insurance (whether primary or excess) immediately preceeding the layer of coverage provided by this Certificate, including any change by endorsements. The Company [American Re-Insurance] shall be notified of any change in coverage or premium in such underlying insurance and copies thereof shall be furnished to the Company on request.[100]

American Re-Insurance argues that this policy language unambiguously limits aggregate coverage to $2.5 million. Plaintiffs maintain here, as they did regarding the North Star policy, that the application of American Re-Insurance's aggregate limit is controlled by the terms of the aggregate limits in the underlying insurance. The aggregate limitations of the underlying insurance, according to plaintiffs, apply only to certain types of claims not at issue here.

Under the same reasoning applied above with regard to North Star, the court concludes that the aggregate limits of coverage contained in the American Re-Insurance policy are not restricted to the limited types of claims that the underlying policies' aggregate limits are said to be restricted to. The court finds the American Re-Insurance policy to unambiguously limit its total coverage to $2.5 million.

Accordingly, the motion of American Re-Insurance for summary judgment declaring that its policy number M 0091884 does not provide coverage in excess of $2.5 million dollars for the one-year period from October 26, 1970 to October 26, 1971 is granted.

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[100] Motion Of North Star Reinsurance Corporation And American Re-insurance Company For Partial Summary Judgment On The Issue Of Applicable Limits Of Liability, Attachment A.

V. *Summary*

The motions of defendants North Star and American Re-Insurance for partial summary judgment declaring that their single policies do not provide potential coverage in excess of $2 million and $2.5 million, respectively, for a one-year period, are granted. The motion of defendant Unigard for summary judgment declaring that its single policy limits aggregate coverage for all claims to $25 million is denied.

6. *NUMBER OF POLICY PERIODS*

Three defendants have filed motions for partial summary judgment declaring that their policies, with endorsements, provide coverage for a single policy period only.[101] Consequently, they argue, liability is limited to the single aggregate amounts provided under those policies. Plaintiffs oppose these motions, contending that, as extended, these defendants' policies provide coverage for two separate policy periods. These defendants are potentially liable up to the aggregate amounts established by their policies for *each* of these policy periods, plaintiffs conclude.

After determining the appropriate law to apply, the court will examine each moving insurer's policies individually.

I. *Choice of Law*

The court notes that the resolution of this issue may determine the extent to which the underlying Missouri plaintiffs are compensated for damages that resulted from the activities of IPC in Missouri. Accordingly, the court determines that this issue, like most issues involving the interpretation of the insurance contracts at issue here, is governed by Missouri law. *See* section 1 (Waiver of Defenses) part II (Choice of Law Principles).

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[101] The Travelers Indemnity Company, American Employers and American Re-Insurance.

II. *Travelers*

There is no dispute over the basic facts concerning Travelers policy number T-NSL-951040-70. Its "Declarations" page states that the policy period was "From Oct. 3 1970 to Oct. 3 1971 12:01 A.M." An endorsement labeled "Symbol No. 8000" and dated June 21, 1971 states in part: "Policy Period to read: Oct. 3, 1970 to Jan. 1, 1972. The policy also contains per occurrence limits of $500,000 for bodily injury and property damage combined, and separate aggregate limits of $500,000 each for bodily injury and property damage resulting from certain hazards, such as products and completed operations. The dispute here is over whether the endorsement's three-month extension of coverage constitutes a new policy period, to which separate aggregate coverage limits would apply.

The general rule for construing policy renewals in Missouri is well established: "The renewal of an insurance policy is a separate and distinct contract for the period of time covered by the renewal unless it is apparent that the parties merely intended the renewal to constitute a continuation of the old policy." *DeWitt v. American Family Mut. Ins. Co.*, 667 S.W.2d 700, 705 (Mo. 1984) (en banc) (finding new fire insurance policy where coverage extended by May 1980 policy terms, which stated it was effective "from 5-1-80;" citing *Krey Packing Co. v. Employer's Liability Assur. Corp.*, 127 S.W.2d 780, 782 (Mo. Ct. App. 1939)).

Under the reasoning of *Krey Packing*, cited by the Missouri Supreme court in *DeWitt*, in order for the court to conclude that the parties intended the existing policy period to be extended *without* triggering new coverage limits, such a restriction "must be found in clear and unambiguous terms within the four corners [of the endorsement]."[102] *Krey Packing Co.*, 127 S.W.2d at 782.

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[102] Both plaintiffs and defendants have offered extrinsic evidence of various types in support of their positions. The court does not

The parties have cited to no language in the endorsement, or in any other part of the contract that affirmatively establishes this intention.

The *Krey Packing* decision gives examples of situations in which this presumption was rebutted by such "clear and unambiguous" terms, distinguishing from itself the cases of *Grand Lodge of United Brothers v. Massachusetts Bonding and Insurance Co.*, 324 Mo. 938, 25 S.W.2d 783 (Mo. 1930) and *United States Fidelity & Guaranty Co. v. Barber*, 70 F.2d 220 (6th Cir. 1934). In *Grand Lodge*, the court noted, the extension certificate for a bond "provided that the aggregate liability of the bonding company from the date of the issuance of the bond to the date of the expiration of the certificate should not exceed $20,000." 127 S.W.2d at 783. The American Employers' policies, by contrast, set coverage limitations on the original Declarations page, which also established the policy period as October 26, 1970 to October 26, 1971. The endorsements do not contain any reference to coverage limitations.

The *Krey Packing* court also noted clear and unambiguous language from the *Barber* decision which supplied the necessary limiting statement: "Provided this list shall be deemed a part of the original bond, and not a new obligation, nor shall it create cumulative liability." 127 S.W.2d at 783. The endorsement to Travelers' policy, however, does not reflect any explicit attempt to address its effect on liability. Lacking such a clear indication of the parties' intent to limit coverage to a single policy period, the court must presume otherwise.[103]

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find this material to clarify the ambiguity at hand, however, which must be construed in favor of greater coverage for the insured. *See Heshion Motors*, 600 S.W.2d at 537.

[103] *Cf. Massachusetts Bonding and Ins. Co. v. Julius Seidel Lumber Co.*, 279 F.2d 861, 867-68 (8th Cir. 1960) (comparing *Grand Lodge* with *Krey Packing*; finding new bond not created because original bond not for definite, fixed period but "continuing until the termination of this suretyship").

Although the *Krey Packing* decision involved a new Continuation Certificate to a bond and the Travelers' CGL policy was extended by endorsement to an existing contract, without any further changes, the court sees no basis in these distinctions to treat these cases differently. Like the bond in *Krey Packing*, the Travelers' policy originally provided a specified amount of coverage for a one-year period of time, and charged a premium based on those variables. The endorsement, like the certificate, provided a further period of coverage for the consideration of an additional premium. In the case of the bond certificate, a Missouri appellate court held that the extended period would be treated as a new contract, subject to a new coverage limitation. The court sees no reason why this precedent should not be followed here. Accordingly, the court holds that the endorsement establishing an additional coverage period creates a new contract, subject to same dollar limitation stated in the original policy but separately applicable to the period October 26, 1971 to January 1, 1972.

Traveler's motion for summary judgment declaring that its policy number T-NSL-951040-70, as modified by endorsements, provides coverage for a single policy period only is denied.

III. *American Employers*

American Employers also has moved for partial summary judgment declaring that its two excess policies, numbers AW-850-490 and AW-850-491, with endorsements, provide coverage only for a single policy period extending from October 26, 1970 to January 1, 1972. Plaintiffs claim that these policies provide coverage for two separate periods, to which separate coverage limits apply.

The relevant facts are undisputed. American Employers' policies originally provided excess coverage for the period October 26, 1970 to October 26, 1971. Each policy limited liability under the following language: "(b) Pro-

portion of Risk Insured: $2,500,000 part of $5,000,000. Combined Single Limit Personal Injury and Property Damage excess of $15,000,000. Combined Single Limit Personal Injury and Property Damage." Each policy also contains an endorsement # 6 with the following identical language: "IN CONSIDERATION of an additional premium of [] it is also agreed that the policy period is extended to expire on the following date: JANUARY 1, 1971." This endorsement begins with the form language "This endorsement, effective *10/26/70*, forms part of Policy No. [—] issued to *CHARTER OIL COMPANY, ET AL.* by the insurance company indicated below by an 'X' [American Employers' Insurance Company]." [104]

American Employers argues that this language indicates the parties' intention that coverage be provided for a single policy period, over which the coverage limitations would apply. Although American Employers' reading of the endorsement language is plausible on its face, the court finds it insufficient to overcome the presumption under Missouri law that a policy renewal constitutes a separate and distinct contract.

Under the reasoning of the Missouri appellate court in *Krey Packing*, discussed above with regard to the Travelers' policy, characterizations of the policy period as "continued", "extended" or "renewed" are not controlling. The additional period of coverage will be treated as a new contract, with "new" coverage limitations, unless the endorsement states "in clear and unambiguous terms" that the coverage limitations set forth with regard to the original policy period apply to the entire period, encompassing both the period of the original policy and the period added by the endorsement. In the absence of such explicit limitations, the terms of the original one-year policies, including

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[104] Reply Of American Employers' Insurance Company In Support of Its Motion for Partial Summary Judgment Regarding The Policy Period for Which It Insured Plaintiffs, Exhibits B & C.

their coverage limits, apply equally to the "new" policy periods from October 26, 1971 to January 1, 1972.

As noted above with respect to Traveler's motion, the court's analysis is based on the policies as written, and not on extrinsic evidence of the parties' intent or prior interpretations.[105] American Employers' motion for summary judgment declaring its policies numbers W-8500-490 and W-8500-491, provide coverage for a single policy period only is denied.

IV. *American Re-Insurance*

American Re-Insurance similarly has moved for partial summary judgment declaring that its policy number M 0091884, with all endorsements, provides coverage for a single period only. Plaintiffs object, contending that two separate periods are covered by the policy.

The parties do not dispute the relevant policy language. The policy originally provided excess coverage for the period October 26, 1970 to October 26, 1971. Coverage was limited by the following provision: "Item 5 LIMIT(S) OF COVERAGE HEREUNDER: $2,500,000 (50%) part of $5,000,000 in excess of the limits shown in Item 4 above." Endorsement #2, furthermore, stated "The policy is amended to show an expiration date of 1-1-72." [106]

American Re-Insurance asserts that this language clearly indicates that a single policy period is intended, since the endorsement contains nothing to suggest any

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[105] Plaintiffs also argue that American Employers' Policies should be construed according to certain policies of Lloyds' and Travelers to which they follow form. The court does not reach this argument, however, since separate coverage for the additional period created by the endorsements is found under the American Employers' policies themselves.

[106] Reply of Defendant American Re-Insurance Company In Support of Motion for Summary Judgment—Single Policy Period, Exhibit A.

other result. Based on the reasoning given above with regard to the Travelers' policy, however, the court understands Missouri law to create a presumption that such an extension creates a new contract, with new coverage limits, unless "clear and unambiguous terms" indicate that the entire period is subject to the single aggregate limit. *See Krey Packing*, 127 S.W.2d at 783.[107] Since such explicit terms are lacking here, the court finds a new policy period to be created by the endorsement here, subject to a separate limitation of coverage.

Accordingly, the motion of American Re-Insurance for summary judgment declaring that its policy number M 0091884 provides coverage only for a single policy period is denied.

V. *Summary*

The motions of Travelers, American Employers and American Re-Insurance for summary judgment declaring that their policies provide coverage, if any, for a single policy period, are denied.

7. *POLICIES CLAIMED TO HAVE EXPIRED BEFORE CONTAMINATION AT SPECIFIC SITES*

Certain defendants, including primary carrier Travelers Indemnity Company, (Travelers) and a number of excess insurers,[108] have filed motions for summary judgment declaring that they have no obligation to defend or indemnify plaintiffs with regard to claims at specific sites

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[107] Having found separate coverage for the additional period created by the endorsement, the court need not reach plaintiffs' argument that the American Re-Insurance policy should be construed according to the policies of certain Lloyd's and Travelers' policies to which they follow form.

[108] American Employers, Employers Commercial Union, American Home, ISOP, Stonewall Insurance Company, American Re-Insurance, North Star, CNA and Certain Underwriters at Lloyd's, London, and Certain London Market Insurance Companies (collectively "London Market defendants").

they claim were not contaminated with dioxin until after their policies had expired.

The court has made several other rulings involving this basic claim. On February 5, 1987, the court granted summary judgment for Travelers with respect to claims arising from the Times Beach and Minker/Stout sites, and for Hartford with respect to "Minker/Stout" cases. The court found that "[t]he Minker/Stout properties were first contaminated in 1974," when dirt was moved there from Bubbling Springs Stables. Memorandum Opinion of February 5, 1987 at 10. The Times Beach site was found to have been sprayed in 1972. *Id.* at 11; Memorandum Opinion of April 28, 1987 at 10 (affirming Feb. 5 decision despite some evidence to contrary; finding no reasonable jury could conclude otherwise).

Because Travelers' policy [109] expired on January 1, 1972 and Hartford's on January 1, 1974, the court concluded that no injury-in-fact could have occurred triggering these policies at sites that were contaminated only after the policies had expired. *See* Memorandum Opinion of February 5, 1987 at 10. On March 25, 1987, the court modified its earlier order, to relieve Hartford of its duty to defend and indemnify only with respect to its 1972 policy, which expired on January 1, 1973.[110]

The court has also granted several subsequent motions involving additional "Minker/Stout" and "Times Beach" claims. *See* Memorandum Opinion of April 8, 1987 at 7 (granting Travelers motion with respect to *NHI* case as "Minker/Stout" case); Memorandum Order of May 20, 1987 at 2 (granting Hartford motion with respect to *NHI* case); Memorandum Order of May 22, 1987 at 1-2

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[109] Policy number T-NSL-951040-70.

[110] This subsequent order reflected new evidence that the Minker/Stout properties may have been contaminated as early as March 21, 1973, rather than in 1974 as previously believed. *See* Memorandum Order of March 25, 1987 at 1-2.

(granting Travelers motion with respect to *Koenig* case as "Minker/Stout" case).

I. *Travelers*

Travelers seeks relief of its duty to defend and indemnify with regard to the following claims:

(1) claims of the State of Missouri in *State of Missouri v. Independent Petrochemical Corp.*, C.A. No. 83-2670-C (E.D. Mo.) ("*Missouri v. IPC*");[111]

(2) claims filed by the United States Environmental Protection Agency (EPA) against plaintiffs in four administrative orders styled (a) *In re Times Beach Facility* (EPA Docket No. 85-F-0004), (b) *In re Minker/Stout/Romaine Creek Facility* (EPA Docket No. 85-F-0005), (c) *In re East North Street Facility* (EPA Docket No. 85-F-0009), and (d) *In re Lacy Manor Facility* (EPA Docket No. 85-F-0010) (Times Beach Order, Minker/Stout/Romaine Creek Order, In re East North Street Order, Lacy Manor Order);

(3) claims that in their entirety seek bodily injury and property damage arising at five sites known as (a)

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[111] The court previously denied a similar Travelers' motion with regard to *Missouri v. IPC* because of its finding that "the Missouri Attorney General alleges property damage as early as 1971," prior to the expiration of Travelers' policy. Memorandum of February 5, 1987 at 16.

The court also denied Travelers' subsequent motion to be relieved of its duty to defend and indemnify only with regard to the "Minker/Stout" claims in *Missouri v. IPC*, stating that "an insurer must continue to contribute to defense costs in each underlying action in which its policy is implicated, unless and until it can show as a matter of law that it is not liable to plaintiffs in that action in its entirety." Memorandum of April 8, 1987 at 6. Plaintiffs no longer contest that *Missouri v. IPC* is wholly a "Minker/Stout case."

Travelers bases this new motion on additional evidence not presented with the previous motions indicating that the relevant sites were contaminated after the expiration of Travelers' policy on January 1, 1972.

East North Street, (b) Lacy Manor, (c) Saddle and Spur Club, (d) Bull Moose Tube, and (e) Hamill Transfer.

The court has already found that the Minker/Stout and Times Beach sites were contaminated by dioxin after the expiration of Travelers' policy on January 1, 1972. Travelers offers evidence to show that the Missouri case and the Minker/Stout/Romaine Creek Order are also "Minker/Stout" cases, and that the Times Beach Order is a "Times Beach" case. If so, no injury-in-fact alleged in these claims could have arisen prior to the expiration of Travelers' policy, and summary judgment on these claims would be appropriate.

Travelers also offers evidence that the five sites from which the remaining claims at issue here arose also were first sprayed with the dioxin-contaminated waste oil after the expiration of Travelers' policy on January 1, 1972.

Plaintiffs do not dispute that five of the seven sites at issue here [112] were contaminated by dioxin after Travelers' policy had expired, and that under the court's Orders of February 5, 1987 and April 28, 1987, summary judgment is appropriate.[113] With regard to two sites, Saddle and Spur Club and Hamill Transfer, plaintiffs offer evidence indicating that Russell Bliss may have sprayed these sites in 1971. Summary judgment must be denied, they argue, because a fact material to the issue of Travelers' liability is in dispute.

Faced with this apparent conflict, the court must examine the evidence relied on more closely to determine whether there is "sufficient disagreement to require submission to a jury or whether it is so one-sided that [one

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[112] Minker/Stout, Times Beach, East North Street, Lacy Manor and Bull Moose Tube. Plaintiffs also do not dispute that the *Missouri v. IPC* is a "Minker/Stout case."

[113] Plaintiffs state, however, that they formally oppose Travelers' motion for the reasons set forth in their pleadings on Travelers' earlier motions on this issue.

side] must prevail as a matter of law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512 (1986).

A. *Saddle and Spur Club*

With regard to the Saddle and Spur Club, Travelers cites three sources that indicate the site was sprayed with dioxin-contaminated oil in 1972. The Appendix to the Final Report of the Missouri Dioxin Task Force, dated October 31, 1983, states at IV-53: "The horse arena at the riding club was sprayed with contaminated waste oil in 1972." [114] A Preliminary Investigation Report by Mike Duvall of the Missouri Department of Natural Resources states that the property was oiled by Bliss "sometime around 1972," based on his contacts with Connie and Hermie Jeter, who were members of the club.[115] An EPA status report, dated August 29, 1983, states: "In approximately 1972, this outdoor horse arena was sprayed with dioxin contaminated waste oil." [116]

Plaintiffs offer three documents indicating that Bliss may have sprayed the Spur and Saddle Club in 1971. A Fact Sheet contained in the files of various Missouri agencies states: "In 1971 or 1972, Bliss sprayed the arena

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[114] Volume II of Exhibits to Joint Statement of Defendants Aetna Casualty & Surety Company, Insurance Company of North America, and United States Fire Insurance Company of Material Facts as to which There is No Genuine Issue, Exhibit 73 (Vol. II of Exhibits to Defendants' Joint 108(h) for Property Damage Motion).

[115] Vol. II of Exhibits to Defendants' Joint 108(h) for Property Damage Motion, Exhibit 74; Joint Statement of Defendants Aetna Casualty & Surety Company, Insurance Company of North America, and United States Fire Insurance Company of Material Facts as to which There is No Genuine Issue at ¶ 97 (Defendants' Joint 108(h) for Property Damage Motion).

[116] Vol. II of Exhibits to Defendants' Joint 108(h) for Property Damage Motion, Exhibit 75.

with contaminated waste-oil." [117] A "Summary of Sites Where the Presence of Dioxin Has Been Confirmed," dated May 26, 1983 and found in the files of the Missouri Department of Natural Resources states: "Investigations indicated the area was oiled by Bliss [sic] late '71 or early '72.[118] Finally, plaintiffs quote from the Second Amended Complaint in *United States v. Bliss*, No. 84-0200-C(1) (E.D. Mo.): "In 1971 or 1972, Bliss transported waste oil from Syntex' Verona plant by motor vehicle to Saddle and Spur Club. The waste oil . . . was sprayed . . . onto the arena . . . ." [119]

Travelers argues that the documents offered by plaintiffs state that the spraying occurred in 1971 or 1972, and so do not contradict their assertion that the Saddle and Spur Club was sprayed in 1972. These sources are ambivalent as to when the spraying occurred, defendants contend, and so are insufficient to create a genuine dispute that would prevent resolution on summary judgment.

Two of Travelers' documents are ambigous also, however. One states that Bliss oiled the property "sometime around 1972." Another notes that the arena was sprayed "[i]n approximately 1972." Only the statement contained in The Appendix to the Final Report of the Missouri Dioxin Task Force states unequivocally: "The horse arena at the riding club was sprayed with contaminated waste oil in 1972."

The court concludes that the evidence submitted by Travelers is insufficient for this court to find as a matter of law that the Saddle and Spur Club was sprayed after

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[117] Vol. I of Exhibits to Defendants' Joint 108(h) for Property Damage Motion, Exhibit 32 at 3.

[118] Vol. II of Exhibits to Defendants' Joint 108(h) for Property Damage Motion, Exhibit 76 at ¶ 18; Defendants' Joint 108(h) for Property Damage Motion at ¶ 99.

[119] Vol. 1 of Defendants' Joint 108(h) for Property Damage Motion, Exhibit I at ¶ 33.

January 1, 1972. The investigative reports cited by the parties here do not explain the factual basis for their conclusions about the date of the spraying at the Saddle and Spur Club. Nor were they necessarily motivated by a sufficiently focused need to determine the exact date of the spraying, as the court is here. This determination must await further factual development at trial. Travelers' motion is denied with respect to claims arising out of the Saddle and Spur Club site.

B. *Hamill Transfer*

Travelers presents a number of documents that it claims establish as a matter of law that the Hamill Transfer site was sprayed after January 1, 1972. The Appendix to the Final Report of the Missouri Dioxin Task Force, for example, states: "According to company records, Bliss oiled . . . this site . . . in May, 1972." [120] An undated memorandum between two officials of the EPA notes: "Company records indicate [Bliss sprayed Hamill transfer] . . . on May 27, 1972." [121] A document prepared by "Reviewer" William E. Riethaler dated August 30, 1983, which Travelers characterizes as a "preliminary investigation report," reports this same information verbatim.[122]

Also cited by Travelers is a "Summary Of Sites Where The Presence Of Dioxin Has Been Confirmed," dated May 26, 1983 and contained in the files of the Missouri Department of Natural Resources which states: "The site

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[120] Vol. III of Exhibits to Defendants' Joint 108(h) for Property Damage Motion, Exhibit 111 at IV-92.

[121] Vol. III of Exhibits to Defendants' Joint 108(h) for Property Damage Motion, Exhibit 112 (From William J. Keffer, Chief, EP&R/ENSV to John C. Wicklund, Director, ENSV).

[122] Vol. III of Exhibits to Defendants' Joint 108(h) for Property Damage Motion, Exhibit 113.

was oiled by Bliss on May 27, 1972 . . . ." [123] An August 17, 1983 letter from the federal Department of Health & Human Services to the P.J. Hamill Transfer Co. contains the statement: "The site was sprayed with waste oil containing dioxin on June 20, 1972 by the Bliss Waste Oil Service." [124]

Both defendants and plaintiffs attempt to draw support from Bliss' deposition testimony, taken April 17, 1986 in relation to the *Drinkard v. IPC* case:

> Q. In the year 1971, did you spray the following locations, Times Beach, Shenandoah Stables, Timberline Stables, Bubbling Springs, Jones Truck Terminal, Bonifield Truck Line, ABF Freight, PIE, P.J. Hamill, and NuWay?
>
> * * *
>
> A. Yes, I did.
>
> * * *
>
> Q. Do you know the exact dates, Mr. Bliss, of your spraying in 1971 of the various truck lines that we mentioned earlier, that is Jones, Bonifield, ABF Freight, PIE, P.J. Hamill and NuWay, all of which you said you sprayed in 1971?
>
> A. They were sprayed in the spring or summer of '71, when you have dust problems.
>
> * * *
>
> Q. When did you begin dealing with P. J. Hamill?
>
> A. I only oiled that place once or twice. It's been there for a long, long time in St. Louis and that's why I have a good memory for that.
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> * * *

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[123] Vol. II of Exhibits to Defendants' Joint 108(h) for Property Damage Motion, Exhibit 76 at ¶ 19.

[124] Vol. III of Exhibits to Defendants' Joint 108(h) for Property Damage Motion, Exhibit 114 at 2.

Q. When was it that you oiled [P.J. Hamill]?
A. About 1970, '71, '72, in that area.
Q. Was it in the same year?
A. What do you mean, was it in the same year?
Q. You said you oiled it once or twice. I mean, do you recall doing it more than once?
A. I believe we done it twice.
Q. All right. Do you know whether that was done twice in the same year?
A. No, it was done, as I remember, once one spring and then the next spring.[125]

Defendants argue that this testimony places the spraying in "mid 1972." Plaintiffs contend that Bliss' statements indicate that he sprayed the Hamill Transfer site at least once between October 3, 1970 and January 1, 1972, while Travelers' insurance was in effect. At a minimum, plaintiffs conclude, a factual question is presented, precluding summary judgment.

The court concludes that Bliss' testimony is insufficient as a matter of law to establish a genuine dispute requiring further fact-finding at trial. As in an earlier opinion on a related question, the court here finds plaintiffs' evidence to be "closer to the 'scintilla' said by the *Anderson* Court to be inadequate to prevent summary judgment." Memorandum Opinion of April 28, 1987 at 10 (citing *Anderson v. Liberty Lobby*, 447 U.S. 242, 251, 106 S.Ct. 2505, 2512 (1986)).

The court's April 28, 1987 opinion questioned the reliability of certain recent testimony by Bliss. In finding as a matter of law that Times Beach had been sprayed in 1972, the court concluded that Bliss' 1987 testimony—that he sprayed Times Beach in 1971—"should be accorded little weight." Memorandum Opinion of April 28, 1987 at 8. The court noted that Bliss had acknowledged

[125] Vol. III of Exhibits to Defendants' Joint 108(h) for Property Damage Motion, Exhibit 115 at 50-51, 61 & 234.

in 1983 that he placed the Times Beach spraying in the year 1971 based not on his own recollection, but that of former Times Beach Mayor Gary Overton. Overton maintained that he had been mayor in 1971, when the spraying took place, despite city records reporting his election in 1972. *Id.* at 8-9. In light of Bliss' 1972 testimony, shortly after the events in question, that he had sprayed Times Beach in 1972, the court found that plaintiffs' evidence that the spraying had occurred in 1971 was insufficient to support a reasonable jury finding.

Although Travelers has cited here to no comparable testimony by Bliss nearer to the date of these events, several documents report the date of the spraying based on the records of the Hamill Transfer company. Although most of these documents give the date of the spraying as May 27, 1972, one letter that was sent to the company puts the spraying on June 20, 1972. The court finds Bliss' 1986 testimony, 14 or 15 years after the events occurred, to be far too ambiguous and imprecise[126] to raise a genuine issue of fact when contrasted with these written reports.

The court concludes that Travelers is entitled to summary judgment with respect to any claims that arise entirely out of contamination at the Hamill Transfer site.[127]

II. *Excess Defendants*

A number of excess defendants have filed motions for summary judgment on the grounds that their policies had expired either (1) prior to the time that contamination occurred at the Times Beach site in 1973 or 1974, or (2) prior to the time the Minker/Stout site was contaminated in 1974.

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[126] Policy number T-NSL-951040-70.

[127] When Travelers submits a list of such claims, the court will enter an appropriate order.

Defendants American Employers,[128] American Re-Insurance [129] and Stonewall [130] assert that their policies expired on the same date as Travelers' 1971 primary policy—January 1, 1972. Collectively, they ask that the court apply its Orders of February 5, 1987, March 25, 1987, April 8, 1987, May 20, 1987 and May 22, 1987 to them, and grant summary judgment in their favor with regard to 49 claims arising from both the Times Beach and Minker/Stout sites. Certain Underwriters at Lloyd's and certain London Market Insurance Companies (collectively "London Market defendants") have also requested summary judgment with respect to their pre-1972 policies on the "Minker/Stout" and "Times Beach" cases.[131]

Defendants Employers Commercial Union,[132] CNA,[133] North Star,[134] American Home [135] and ISOP [136] state that their policies expired on the same date as Hartford's 1972 primary policy [137]—January 1, 1983. These excess insurers ask that the court apply to them the Orders listed above, and grant them summary judgment with respect to 31 "Minker/Stout" cases. London Market defendants also seek summary judgment with respect to their 1972 policies on the "Minker/Stout" cases.

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[128] Policy number AW-8500-490 and # AW-8500-491.

[129] Policy number T-NSL-951040-70.

[130] Policy number EP45490 and # EP45491.

[131] This motion is contained within a pleading by these defendants which advances numerous motions entitled "London Market Defendants' Motions for Summary Judgment or, in the Alternative, for Partial Summary Judgment."

[132] Policy number EX 8592-001 and # EX-8592-002.

[133] Policy number RDU 9223936 and # RDX 889-19-58.

[134] Policy number NSX-10161.

[135] Policy number CE 2691802.

[136] Policy number 4172-5181.

[137] Policy number 21CD18100E.

Plaintiffs formally oppose these defendants' motions for the reasons set forth in their previous briefs.[138] Plaintiffs do not dispute, however, that under the court's prior rulings, these defendants are entitled to summary judgment. The court grants the summary judgment motions of these excess insurers with respect to the "Minker/Stout" and "Times Beach" cases listed below:

"Minker/Stout" Cases

Murray P. Abrahamson, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-01314 (Cir. Ct., St. Louis, Mo.);

Michael H. Arlt, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00803 (Cir. Ct., St. Louis, Mo.);

Martin Gene Barron, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00803 (Cir. Ct., St. Louis, Mo.);

John Capstick, et al. and George McArthy, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00453 (Cir. Ct., St. Louis, Mo.);

Robin Czapla, et al. v. Independent Petrochemical Corp., et al., Cause No. 852-05580 (Cir. Ct., St. Louis, Mo.);

David E. Davis, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-01338 (Cir. Ct., St. Louis, Mo.);

Robert E. Drinkard, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00807 (Cir. Ct., St. Louis, Mo.);

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[138] Plaintiffs' opposition does not address the motions of London Market defendants on this issue. The court is aware of no relevant distinction among the claims of these defendants on the present issue, however, and will resolve London Market defendants' motion accordingly.

James A. Haeger, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-01428 (Cir. Ct., St. Louis, Mo.);

Junie Jewel Hanks, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00802 (Cir. Ct., St. Louis, Mo.);

Joseph Walter Henderson, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-01337 (Cir. Ct., St. Louis, Mo.);

Donna Jean How v. Independent Petrochemical Corp., et al., Cause No. 832-00805 (Cir. Ct., St. Louis, Mo.);

Jeffrey William Jobst, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00807 (Cir. Ct., St. Louis, Mo.);

Joseph Korenak, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-01336 (Cir. Ct., St. Louis, Mo.);

Dennis Lynch, et al. v. Independent Petrochemical Corp., et al., Cause No. 822-0687 (Cir. Ct., St. Louis, Mo.);

Ronald W. McCormick, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-01795 (Cir. Ct., St. Louis, Mo.);

Robert W. McGraw, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00253 (Cir. Ct., St. Louis, Mo.);

Harold Minker, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00386 (Cir. Ct., St. Louis, Mo.);

Gary Nelson, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00804 (Cir. Ct., St. Louis, Mo.);

Richard William Noel, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00800 (Cir. Ct., St. Louis, Mo.);

Roger D. Northcutt, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00801 (Cir. Ct., St. Louis, Mo.);

Ronald Payne, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-01315 (Cir. Ct., St. Louis, Mo.);

Raymond M. Schlund, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00799 (Cir. Ct., St. Louis, Mo.);

Gary B. Schoen, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00806 (Cir. Ct., St. Louis, Mo.);

James W. Skaggs, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00797 (Cir. Ct., St. Louis, Mo.);

Melbert Steffens, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-01335 (Cir. Ct., St. Louis, Mo.);

John Vickers, et al. v. Independent Petrochemical Corp., et al., Cause No. 822-06716 (Cir. Ct., St. Louis, Mo.);

Larry Webb, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-01339 (Cir. Ct., St. Louis, Mo.);

Demetra (Debbie) Williams, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-00798 (Cir. Ct., St. Louis, Mo.);

Elmer Lee Williams, et al. v. Independent Petrochemical Corp., et al., Cause No. 832-01429 (Cir. Ct., St. Louis, Mo.);

NHI Development Co. v. Syntex Agra Business [*sic*], *Inc.*, Cause No. 183-1560-CC (Cir. Ct., Jefferson Co., Mo.);

Julis Ann Koenig v. Syntex Agribusiness, Inc., No. 872-00948 (Cir. Ct., City of St. Louis, Mo.).

"Times Beach" Cases

Jerry E. Akers, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 842-04887 (Cir. Ct., St. Louis, Mo.);

Harold A. Andre, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 832-05432 (Cir. Ct., St. Louis, Mo.);

Corrine Brennan, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 852-02464 (Cir. Ct., St. Louis, Mo.);

Sandra Brown, et al. v. Syntex Abribusiness, Inc., et al., Cause No. 852-01602 (Cir. Ct., St. Louis, Mo.);

Angela Buchanan, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 852-01602 (Cir. Ct., St. Louis, Mo.);

John Capstick, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 832-00453 (Cir. Ct., St. Louis, Mo.);

Dale Crane, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 852-02465 (Cir. Ct., St. Louis, Mo.);

Robert Drinkard, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 832-00807 (Cir. Ct., St. Louis, Mo.);

Kenneth Grubbs, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 842-0885 (Cir. Ct., St. Louis, Mo.);

William H. Holmes, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 842-04884 (Cir. Ct., St. Louis, Mo.);

Robert P. Miller, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 842-04888 (Cir. Ct., St. Louis, Mo.);

Troy Pritchett, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 852-02466 (Cir. Ct., St. Louis, Mo.);

Patricia Rutledge, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 842-04886 (Cir. Ct., St. Louis, Mo.);

Sherrie Sowards, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 842-01005 (Cir. Ct., St. Louis, Mo.);

Janet Spradley, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 852-01600 (Cir. Ct., St. Louis, Mo.);

Larry Stewart, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 842-04889 (Cir. Ct., St. Louis, Mo.);

Susan Warmuth, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 842-04890 (Cir. Ct., St. Louis, Mo.);

Neely Wren, et al. v. Syntex Agribusiness, Inc., et al., Cause No. 852-01601 (Cir. Ct., St. Louis, Mo.).

Excess insurers American Re-Insurance, North Star, CNA, American Employers and Employers Commercial Union have also filed reply briefs requesting that the court grant summary judgment in favor of these defendants, as appropriate, with respect to any further claims the court determines qualify as "Minker/Stout" or "Times Beach" cases. These defendants specifically note *State of Missouri v. Syntex U.S.A., Inc.*, No. 85-2856-C-6 (E.D. Mo.), regarding which Travelers has filed a separate motion for summary judgment.[139]

The court declines to consider such an open-ended request made in a footnote in defendants' reply briefs, after plaintiffs have already filed their reply to defendants' motions. The court will consider further motions by defendants, however, for the limited purpose of identifying such "Times Beach" and "Minker/Stout" cases and the insurance policies which they clearly do not involve.

III. *Summary*

The motion of defendant Travelers is granted with respect to the specified claims that in their entirety seek bodily injury and property damage arising at the following sites: Minker/Stout, Times Beach, East North Street, Lacy Manor, Bull Moose Tube and Hamill Transfer.

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[139] *See* Reply Memorandum of Points and Authorities in Support of Motion of Defendant The Travelers Indemnity Company for Partial Summary Judgment at 2 n.2 (noting that plaintiffs' reply to their initial motion conceded that *Missouri v. Syntex* case is a "Times Beach" case subject to this court's prior rulings of February 5, 1987 and April 28, 1987).

Travelers' motion is denied with respect to claims arising out of the Saddle and Spur Club site. The motions of the excess insurers for summary judgment with respect to specified "Minker/Stout" and "Times Beach" cases are granted.

8. *PROPERTY DAMAGE CLAIMS FROM CONTAMINATION BEFORE POLICIES STARTED*

A number of primary and excess insurer defendants have filed motions for summary judgment seeking to be relieved of their duties under particular policies to defend and indemnify plaintiffs with regard to certain property damage claims.[140] These motions concern property damage claims arising from certain sites, designated by name by most of the defendants, which they contend were contaminated—and immediately damaged—with dioxin-laden waste oil prior to the commencement of their insurance coverage.[141]

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[140] Separate motions were filed by primary insurers (1) Aetna; (2) INA and U.S. Fire; and (3) Hartford; as well as excess insurers (4) Harbor, (5) American Home, ISOP and Lexington; and (6) London Market defendants. Harbor's motion adopted that of Aetna; American Home, ISOP and Lexington adopted Hartford's motion. Aetna, INA and U.S. Fire filed a joint statement of undisputed facts, which was joined by American Home, INA and Lexington.

[141] Defendants Aetna, INA, U.S. Fire, Hartford, and Harbor have each listed the following sites: Shenandoah Stables, Timberline Stables, Bubbling Springs, Rosati/Piazza Road, Quail Run, Hamill Transfer Co., Jones Truck Line, Arkansas Best Freight, Community Christian Church, Manchester Methodist Church, Baxter Garden Center, Frontenac Tank, Castlewood/Sontag Road, Bliss Farm, Mid-America Arena, Overnight Transportation Co./Pacific Intermountain Express (P.I.E.), Bonifield Brothers Trucking Co., and East Texas Motor Freight.

Aetna, INA, U.S. Fire, and Harbor have each designated the following additional sites: Minker/Stout/Romaine Creek, Saddle & Spur Club, East North Street, Times Beach, Bull Moose, Tube Co., Southern Cross Lumber Co., and Access Road to Old Highway 141.

I. *Background*

In an earlier decision in this case, the court indicated that it would consider motions for summary judgment with regard to an insurer's duty to defend and indemnify, where an insurer could "show that coverage fails because of some reason specific to that policy." *IPC v. Aetna*, 654 F.Supp. at 1361. The court noted further, however, that if the insurer claims "coverage fails because of some reason specific to an underlying dioxin-related claim (e.g. the entire injury process fell completely outside the time the insurance policy was in place)," summary judgment would be inappropriate and the insurer "can pursue the matter in whichever court that claim is being brought." *Id.*

Hartford seeks summary judgment on the Saddle & Spur Club and Times Beach sites only with respect to its 1973 policy.

INA and U.S. Fire seek summary judgment also with regard to the Highway 100/Erxleben and Lacy Manor/Sandcut Road sites. Aetna seeks summary judgment on these sites as well but only with regard to its 1978, 1979 and 1980 policies.

American Home and ISOP do not name the sites for which they seek summary judgment, instead describing them as the sites sprayed outside the period of their 1972 policies (January 1, 1972 to January 1, 1973). This section will discuss these defendants' motion with regard to sites sprayed before the start of their 1972 and 1975 policies. Whether summary judgment should be granted with regard to sites originally contaminated after the expiration of their policies is discussed *supra* in section 7 (Policies Claimed to Have Expired Before Contamination at Specific Sites). Lexington joins American Home and ISOP in requesting summary judgment with respect to their 1975 policies for property damage claims at *all* sites.

London Market defendants seek summary judgment with respect to all of its policies commencing after January 1, 1975. These defendants also seek summary judgment with respect to policies that expired prior to January 1, 1972 and January 1, 1973 for the Minker/Stout and Times Beach sites. Whether these defendants are entitled to summary judgment with respect to their October 26, 1970 to January 1, 1972 policies is discussed *supra* in section 7 (Policies Claimed to Have Expired Before Contamination at Specific Sites).

This suggestion recognized both the inherent limitations of the summary judgment context, *see supra* section 7 (Policies Claimed to Have Expired Before Contamination at Specific Sites), and the court's reluctance to preempt the Missouri courts adjudicating the underlying claims, on questions of Missouri tort law. *See* Memorandum of February 5, 1987 at 13-14.

Since then, the court has granted a number of motions for summary judgment with regard to specific sites, such as the Minker/Stout and Times Beach sites, in favor of insurers whose policies had expired before these sites were contaminated by dioxin-tainted waste oil. *See* Memorandum Opinions of February 5, 1987; April 8, 1987; April 28, 1987 and Memorandum Orders of March 25, 1987; May 20, 1987 and May 22, 1987.

II. *Discussion*

Because the arguments presented by the moving defendants here are substantially similar, the court will review them collectively. A number of defendants seek summary judgment with regard to property damage at specific sites they contend were contaminated *before* their policies were in effect. No injury-in-fact could have occurred during their policy periods, these defendants argue, because any property damage at these sites occurred at the time of exposure, when their policies were not yet in effect.

These defendants note the court has already determined that only policies in effect when the underlying claimants were actually injured will be liable to indemnify the plaintiffs. *See IPC v. Aetna*, 654 F.Supp. at 1538, *modified by* Memorandum Opinion of August 8, 1986 at 2-4. The point of such injury-in-fact under Missouri law, moreover, has been held by this court to be a "distinct event rather than a continuous process." Memorandum Opinion of August 8, 1986 at 4. The court also added, however, that "this does not preclude the possibil-

ity of a single claimant suffering more than one injury," as a result of further exposure. *Id. See also IPC v. Aetna*, 654 F.Supp. at 1357-58, *modified by* Memorandum Opinion of August 8, 1986 at 2-3, and Memorandum Opinion of February 5, 1987 at 10-11.

Other defendants, whose policies were in effect when the spraying took place in the early 1970's, oppose these motions, contending that factual issues prevent this court from determining when injury-in-fact occurred in the underlying cases.[142] This determination, they note, requires an individualized examination of the facts that is not possible here, citing the court's earlier statement: "Depending on the facts of each case, the chemical involved, the period and intensity of exposure, and the person affected, an injury may occur in this sense upon exposure, at some point after exposure but before manifestation of the injury or at manifestation." *IPC v. Aetna*, 654 F.Supp. at 1358.

Moving defendants assert that this statement relates only to bodily injury and does not apply to the trigger of coverage for property damage, which they maintain occurs on exposure, citing the Eighth Circuit's *en banc* decision in *Continental Insurance Co. v. NEPACCO*, 842 F.2d 977, 984 (1988) (stating in dicta that "Missouri would probably adopt the 'exposure' theory of coverage," but noting little practical difference between application of an 'exposure' or 'injury-in-fact' theory in that case; citations omitted). *But see United States v. Conservation Chem. Co.*, 653 F.Supp. 152, 197 (W.D. Mo. 1986) (applying injury-in-fact theory to property damage claims). Even if the court were to accept the moving defendants'

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[142] Oppositions were filed by (1) American Employers' and Employers Commercial Union, (2) Travelers, and (3) CNA, American Reinsurance and North Star. Travelers adopts the opposition of American Employers' and Employers Commercial Union. CNA, American Reinsurance and North Star adopts all but part III of that opposition.

assertion that coverage is triggered at the time of exposure, it is not clear that all of the property at any given site was exposed to dioxin at the same time.

Plaintiffs and opposing defendants contend that in many claims the time of exposure is unclear. Properties that were not sprayed directly by Bliss, and which did not receive contaminated dirt from an identifiable source, are alleged to have been exposed to dioxin through many different means. According to plaintiffs, dioxin can migrate along widely varying paths: it can be tracked in oil and dirt on shoes, clothing and vehicles; it can be carried by the wind, or by erosion; it can leach from the soil into water sources, or be carried in water run-off to streams and rivers; it can be picked up by animals exposed to contaminated soil and water, and by animals that eat contaminated food.

Summary judgment for such claims is inappropriate, according to plaintiffs and opposing defendants, where it is not known when these processes resulted in certain properties being exposed to dioxin, because the court cannot determine what policies were in effect at the time of injury. The determination of when exposure took place in each specific claim must be left to the Missouri court handling the underlying tort case. *See* Memorandum Opinion of February 5, 1987 at 13-15.

Plaintiffs also argue that even when a site's initial exposure can be determined, summary judgment is inappropriate as to policies covering later years. They contend that later policies may be triggered as well where property damage occurred again later, due to the continued presence of dioxin. There is no dispute that the presence of dioxin on a parcel of land may cause immediate property damage. These parties maintain, however, that subsequent property damage may still occur at a later time.

For example, if the resale value of the property was not reduced to zero upon the first exposure to dioxin,

subsequent exposures may reduce it further. Animals that subsequently come onto the land after the initial exposure may also incur injury at that later date. For claims which allege property damage that may include such subsequent injuries, a claim-specific inquiry into the time of injury must be made in the underlying tort case, and cannot be resolved on summary judgment here. *Cf. Continental Ins. Co. v. NEPACCO*, 842 F.2d at 982, 987 (approving denial of summary judgment with respect to *Capstick* [a "Minker/Stout" case] by district court, which concluded that "more information was necessary in order to determine whether there was an 'occurrence' of bodily injury or property damage, or both, within the policy periods").

Under either an injury-in-fact or exposure trigger, defendant insurer would be entitled to summary judgment with regard to all property damage claims arising from a specific site if it could show the absence of a genuine issue concerning the following facts: (1) that the site was contaminated by dioxin on a known date or dates, (2) that no further property damage occurred anywhere within the site at a subsequent date, and (3) that the insurer's policy was not in effect at the time of the known injury.

The moving defendants have been able to establish that parts of many sites were originally contaminated outside of their policy periods. None, however, has demonstrated that further property damage could not have occurred subsequently within those sites. Plaintiffs have presented examples of underlying cases in which such later damage is specifically alleged, as well as credible evidence supporting the plausibility of such claims.

Morris Kay, EPA Administrator for Region VII, has testified: "we have information indicating that there has been migration of the original [contaminated] soil from where it was placed at the Minker home down all the

way to Romaine Creek," and that "the possibility is certain that the contaminated soil if it is just left right there in place, untouched, unmanaged, would migrate further." [143]

Examples of claims raising this issue include: (1) cases in which dioxin-contaminated soil, through "natural drainage," spread onto claimants' property, making the time of exposure uncertain,[144] (2) cases in which flooding is alleged to have produced widespread subsequent exposure, although the time of the flooding is known,[145] and (3) cases in which already contaminated property changed ownership,[146] which raise a legal question that goes to the merits—concerning how the new owner's newly discovered damage should be treated.[147] Not all of the claims, however, suggest in their complaints that any further injury occurred to the land after

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[143] Plaintiffs' Opposition to Defendants' Motions for Partial Summary Judgment That Only Those Policies on the Risk at the Time of the Original Spraying or Deposit of Contaminated Soil are Triggered and Supporting Affidavits of Stephen A. Kovac (with exhibits), David A. Taylor (with exhibits), and Tim E. Sleeth (with exhibits), at p. II-5 of Exhibit A to Taylor Affidavit (Final Report of the Missouri Dioxin Task Force) (pleading hereinafter referred to as "Plaintiffs' Opposition to Property Damage Motion").

[144] *See, e.g.*, Plaintiffs' Opposition to Property Damage Motion, Exhibit D to Sleeth Affidavit at 3 (Amended Petition in *Barron v. IPC*, 832-00803 (Cir. Ct. City of St. Louis, Mo.) at ¶ 11).

[145] *See, e.g.*, Plaintiffs' Opposition to Property Damage Motion, Exhibit F to Sleeth Affidavit (Complaint in class action *Wehner v. Syntex Corp.*, 83-0642-C (E.D. Mo.) at ¶ 33-34).

[146] *See, e.g.*, Plaintiffs' Opposition to Property Damage Motion, Exhibit J to Sleeth Affidavit (First Amended Plaintiffs' Petition in *Cross v. IPC*, 832-01706 (Cir. Ct. City of St. Louis, Mo.) at ¶ I-III).

[147] *See* Memorandum Opinion of Memorandum Opinion of February 5, 1987 at 13-15 (denying motions for summary judgment on *Cross* case); Memorandum Opinion of April 8, 1987 at 5 (denying summary judgment on *Wehner* cases).

the original contamination.[148] On the basis of the evidence presented thus far, the court is unable to make a generalized determination of when *all* of the property damage alleged in the cases underlying each site occurred.

It is possible that an individualized examination of each underlying case might reveal that certain sites had not given rise to any claims explicitly raising the issue of property damage subsequent to the initial contamination. As the court has previously indicated, however, such individualized fact-finding is inappropriate here. In its Memorandum Opinion of February 5, 1987, the court indicated that consideration would be given to summary judgment motions seeking "relief from a duty to defend and indemnify in entire categories of underlying claims." *Id.* at 13. The court stated, however, that it would not engage in a review of the factual contexts of each individual underlying claim. *Id.* The Missouri courts are the proper place to determine, in the first instance, when the property of individual claimants was damaged. The motions are denied.

III. *Summary*

The motions of these defendants seeking partial summary judgment on the grounds that all property damage occurred at certain sites prior to the commencement of their policies are denied.

9. *COMPLETED OPERATIONS*

Several defendants have filed motions for summary judgment on the ground that provisions governing "completed operations hazards" or "products liability" in their policies limit or exclude coverage for the underlying

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[148] *See, e.g.*, Plaintiffs' Opposition to Property Damage Motion, Exhibit L to Sleeth Affidavit (First Amended Complaint in *Overnite Transp. Co. v. Ryder/P-I-E Nationwide, Inc.*, 86-1060-C-6 (E.D. Mo.)).

claims.[149] Such provisions determine what coverage is available for damages arising from certain "operations" after those operations have been completed, as contrasted with "premises-operations" insurance, which governs coverage for damages arising out of ongoing operations.[150]

Moving defendants argue that whatever damages may have occurred during their policy periods arose from operations that were already completed, and so are subject to the coverage limitations or exclusion specified in their policies. Plaintiffs and three opposing defendants argue that the underlying activities here do not qualify as a completed operation, and so the damages arising from them are not subject to such coverage limitations or exclusion.

Five of the six moving defendants base their motions on language in their policies limiting coverage for completed operations.[151] The policy language defining "completed operations" is identical. One insurer relies on language in its policies limiting coverage for "products liability," which includes "operations" that have been completed.[152]

One insurer argues that its policies exclude any coverage for damages arising out of completed operations.[153] The other moving insurers contend that their provisions place a cap on the coverage provided under their policies for such damages.[154]

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[149] INA, Aetna, Hartford, The Continental Insurance Company ("Continental Ins."), Travelers and Unigard.

[150] *See* Annotation, *Construction and Application of Clause Excluding From Coverage of Liability Policy "Completed Operations Hazards"*, 58 A.L.R.3d 12, 20 (1974).

[151] INA, Aetna, Hartford, Continental Ins., and Travelers.

[152] Unigard.

[153] Continental Ins.

[154] INA, Aetna, Hartford, Travelers and Unigard.

The court will evaluate these motions by first analyzing the completed operations definition common to five of the insurers. The products liability language can then be analyzed by comparison. This analysis must be preceded, however, by a determination of what law to apply.

I. *Choice of Law*

The court has noted above that questions of contract interpretation will generally be governed by Missouri law. *See supra* section 1 (Waiver of Defenses) part II (Choice of Law Principles). As the completed operations/products liability issue concerns operations that took place in Missouri, that gave rise to damage suits by Missouri plaintiffs, and that may determine whether such plaintiffs are compensated for any damages suffered, the court determines that the interpretation of these policy provisions is properly governed by Missouri law.[155]

II. *Coverage For "Completed Operations Hazards"*

All of the policies at issue here provide general liability coverage for bodily injury and property damage, during the period insured, that arise from "occurrences." Specific dollar amount limits are placed on coverage for damages resulting from a given occurrence, as well as for aggregate amounts per policy year.

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[155] Continental Ins. argues that Florida law should control the interpretation of its policy. The court has already determined that unlike the other defendants, Continental's policies cover only TCC and not IPC or COC. Continental argues that Florida has the most substantial interest in the resolution of this issue with respect to its policies, since the policies were issued in Florida, to a Florida corporation (TCC), with its principal place of business in Florida. Since the result of Continental's motion is the same under the law of Missouri and Florida, however, the court will proceed with a unified analysis, including reference to Florida citations.

Five defendants argue that their policies place such an aggregate limit on damages arising out of completed operations. Plaintiffs do not argue that these limitations are not present in defendants' policies; they argue that the underlying activity does not satisfy the requirements of a completed operation.

Each of the policies of these five defendants contains identical language defining a completed operations hazard:

> "completed operations hazard" includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. "Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:
>
> (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
>
> (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
>
> (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replace-

ment because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The completed operations hazard does not include bodily injury or property damage arising out of

(a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,

(b) the existence of tools, uninstalled equipment or abandoned or unused materials, or

(c) operations for which the classification stated in the policy or in the company's manual specifies "including completed operations"; [156]

This language establishes a number of requirements as well as providing guidance as to what constitutes a completed operation. There are three principal requirements. (1) The damage must arise on premises that are not owned by or rented to the named insured, (2) out of an "operation," (3) that has been "completed."

Plaintiffs argue that only operations that take place away from the named insured's premises come within the completed operations hazard. They argue furthermore that since IPC's involvement in the activity at issue consisted largely of telephone communications which IPC participated in from its own premises in Missouri, that this "off-premises" requirement is not met. Defendants argue that the policy language requires only that damage occurs away from premises owned by or rented to the

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[156] Continental Insurance Company policy number CBP 71779, Exhibit C to Memorandum Of Points And Authority In Support Of Defendant The Continental Insurance Company's Motion That The Dioxin Related Claims Are Not Covered By The Charter Company's Policies Issued By Continental.

named insured, and not that the operation giving rise to the injury also take place there.

Plaintiffs and defendants also disagree about how the "operation" should be characterized. A determination of when the operation was completed, of course, depends on the scope of the operation. Damages arising during the policy but before the operation was completed are not subject to coverage limitations or exclusions placed on completed operations.

Plaintiffs argue that Bliss' actions cannot be considered part of plaintiffs' operation because Bliss was an independent contractor. Moving defendants argue that at least some of Bliss' activities can be considered part of the operation, as Bliss was hired by IPC. Various moving and opposing defendants characterize the operation differently: some limiting the operation to Bliss' removal of the waste from the NEPACCO site, and others including Bliss' final disposal of the waste, either in Bliss' storage tanks or as sprayed on the roads and arenas of Missouri.

Despite disagreements over what the relevant operation is, both plaintiffs and opposing defendants argue under various rationales that the operation was not completed. While moving defendants' arguments are tailored to their own policy periods, they all argue that the operation—whether simply removal, or removal and disposal —was completed before damages occurred.

Plaintiffs and opposing defendants contend furthermore that the completed operations hazards and products liability provisions cannot properly be applied by the court until further fact-finding is completed in the underlying cases. Moving defendants maintain, however, that the court need not make individualized factual findings to decide this issue, as it turns on the legal construction of the completed operations/products liability language contained in the policies.

Having outlined these issues, the court concludes that it need not decide them at this stage. The completed operations hazard definition quoted above contains an exception whose ambiguity reasonably suggests coverage and prevents this court from granting defendants' motion for summary judgment. The latter part of the definition reads:

> The completed operations hazard does not include bodily injury or property damage arising out of
>
> (a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof

Whether the operation is limited to IPC's telephone calls to Bliss (as plaintiffs contend), or is expanded to include Bliss' spraying of the waste (as some defendants suggest), it can reasonably be viewed as being "in connection with the transportation of property," since the essence of the service provided was the transportation of the waste (property) away from the NEPACCO site.

The defendants have offered no evidence to counter this reading,[157] which is compelled in light of the provision's ambiguity. *Heshion Motors*, 600 S.W.2d at 537; *see Nixon v. United States Fidelity and Guaranty Co.*, 290 So.2d 26, 29 (Fla. 1973) (resolving ambiguity in favor of insured). Although the principal provisions of

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[157] The cases cited by moving defendants are not comparable to this case because transportation played a much less central role to the service being provided in those cases than is true here. *See, e.g., Jones v. Philip Atkins Constr. Co.*, 143 Mich. App. 150, 371 N.W.2d 508, 513 (Mich. Ct. App. 1985) ("in connection with transportation" exception inapplicable to injuries sustained while repairing air conditioner); *The Smedley Co. v. Employees Mut. Liab. Ins. Co. of Wisconsin*, 143 Conn. 510, 123 A.2d 755, 760 (Conn. 1956) ("pick-up and delivery" exception inapplicable to damages resulting from supply of wrong product).

the completed operations language may unambiguously restrict coverage for certain damages arising out of completed operations,[158] the language of the transportation exception can reasonably be interpreted to allow coverage under the facts of this case.

The motions of defendants INA, Aetna, Hartford, Travelers and Continental Insurance for summary judgment based on the completed operations hazard provisions of their policies are denied.

III. *Coverage for "Products Liability"*

Defendant Unigard's policy is said to limit coverage for occurrences arising out of operations that come within its "products liability" definition:

> The term "Products Liability" means
>
> (a) Liability arising out of goods or products manufactured, sold, handled or distributed by the Named Assured or by others trading under his name if the occurrence occurs after possession of such goods or products has been relinquished to others by the Named Assured or by others trading under his name and if such occurrence occurs away from premises owned, rented or controlled by the Named Assured; provided such goods or products shall be deemed to include any container thereof other than a vehicle, but shall not include any vending machine or any property other than such container,

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[158] *See Abco Tank and Mfg. Co. v. Federal Ins. Co.*, 550 S.W.2d 193, 198 (Mo. 1977) (en banc); *United States Fidelity and Guaranty Co. v. Houf*, 695 S.W.2d 924, 927 (Mo. Ct. App. 1985); *Prieto v. Continental Ins. Co.*, 358 So.2d 851, 854 (Fla. Dist. Ct. App. 1978); *Sandpiper Construction Co. v. United States Fidelity and Guaranty Co.*, 348 So.2d 379, 381 (Fla. Dist. Ct. App. 1977).

rented to or located for use of others but not sold;

(b) Liability arising out of operations, if the occurrence occurs after such operations have been completed or abandoned and occurs away from premises owned, rented or controlled by the Named Assured; provided operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to an agreement; provided further the following shall not be deemed to be "operations" within the meaning of this paragraph: (i) pick-up or delivery, except from or onto a railroad car, (ii) the maintenance of vehicles owned or used by or in behalf of the Assured, (iii) the existence of tools, uninstalled equipment and abandoned or unused materials.[159]

The issues and arguments of the parties here are very similar to those made with regard to the "completed operations" provisions. In addition, plaintiffs cite to cases holding "products liability" provisions ineffective in limiting coverage for service-related—as opposed to product-related—damages: *Rafiner Elevator Works, Inc. v. Michigan Mut. Liab. Co.*, 392 S.W.2d 240 (Mo. 1965); *Kammeyer v. Concordia Tel. Co.*, 446 S.W.2d 486 (Mo. Ct. App. 1969); *Kissel v. Aetna Casualty and Surety Co.*, 380 S.W.2d 497 (Mo. Ct. App. 1964).

Like the completed operations hazard definition, this products liability definition contains an exception: "provided further the following shall not be deemed to be "operations" within the meaning of this paragraph: (i) pick-up or delivery, except from or onto a railroad car."

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[159] Unigard policy number 1-0436, Exhibit A to Motion Of Unigard Security Insurance Company For Partial Summary Judgment On The Issue of Applicable Limits Of Liability (emphasis added).

Ambiguities in such provisions must be construed in favor of the insured. *See Heshion Motors*, 600 S.W.2d at 537. The operation at issue here, however defined, reasonably can be considered "pick-up or delivery," exempting it from the coverage limitations generally applicable to "products liability."

Unigard's motion for summary judgment on the grounds that coverage is limited by its "products liability" (completed operations) provision is denied.

IV. *Summary*

The defendants' motions for summary judgment on the grounds that coverage under their policies is limited by a "completed operations" or "products liability" provision are denied.

10 *POLLUTION EXCLUSION*

In an earlier ruling, the court suggested it would consider summary judgment issues showing that a defendant had no duty to defend or indemnify because of some reason based on its policies. *See IPC v. Aetna*, 654 F.Supp. 1334, 1361 (D.D.C. 1986). Several defendants have filed for summary judgment on the ground that their policies contain a "pollution exclusion" clause that bars coverage in this action.[160] In overly simplified terms, a pollution exclusion clause provides that coverage does not extend to damage from pollution and similar causes. Many such exclusions also contain an exception, allowing coverage for pollution damage caused by a "sudden, unintended and unexpected happening."

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[160] Separate motions have been filed by (1) Unigard; (2) Lexington, American Home, and ISOP; (3) certain London Market defendants; (4) American Reinsurance, North Star and CNA (adopting the Unigard motion); and (5) American Employers and Employers Commercial Union (asserting coverage excluded, without explanation or argument).

I. *Choice of Law*

The court has explained above that because of the location of the primary insured risk in Missouri, in general, defenses that are rooted on an interpretation of defendants' policies will [text omitted from original] (Waiver of Defenses) part II (Choice of Law Principles) (citing *IPC v. Aetna*, 654 F.Supp. at 1356 (trigger-of-coverage issue governed by Missouri law)). The court also has determined that the pollution exclusion clause defenses of defendants Aetna, Hartford, Harbor, American Home, Lexington and ISOP are governed by Missouri law. *See supra* section 1 (Waiver of Defenses) part IV (Policy Interpretation Issues).

The court has noted also that policies designating a particular state's law as controlling will be given effect, unless that state's law is in fundamental conflict with the law of Missouri. *Id.* at part II (citing *IPC v. Aetna*, 654 F.Supp. at 1357). Certain London Market defendants' policies contain a choice-of-law provision designating New York law.

This analysis first will examine the policies of those defendants governed by Missouri law. As the principal actions relevant here took place in Missouri and harm occurred to property and persons located in Missouri, all policies that do not specify another state's law as controlling will be governed by Missouri law. These include all moving defendants, except certain later-year policies of London Market defendants. Since there is no binding precedent from Missouri on this issue, the court will consider the reasoning of other jurisdictions on the application of pollution exclusion clauses, in determining how a Missouri court would resolve these questions. The court next will consider the motion of those London Market defendants whose policies specify New York law as controlling their application. If New York law presents no conflict with a fundamental policy of Missouri

law, the court will resolve these questions according to New York law.

II. *Policies Governed By Missouri Law*

Plaintiffs claim that certain of these defendants waived their pollution exclusion defenses, and set forth their reasoning in a separate waiver motion, addressed above. In addition to excess insurers Lexington, American Home and ISOP, whose waiver was asserted in the waiver motion just noted, plaintiffs claim here that three additional excess insurers—Unigard, North Star and CNA—waived this defense. The court addresses this issue above, denying plaintiffs' motion for summary judgment on grounds of waiver. *See supra* section 1 (Waiver of Defenses) part IV.E (American Home, Lexington and ISOP Pollution Exclusion Defense). For the same reasons set forth earlier, the court is unable to find as a matter of law that Unigard, North Star and CNA waived their pollution exclusion defenses.

The policies of these various defendants contain essentially similar pollution exclusion clauses, of which the following is representative. Moving defendants' policies exclude coverage for:

> Personal injury or bodily injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination, provided always that this paragraph shall not apply to liability for personal injury or bodily injury or loss of or physical damage to or destruction of tangible property, or loss of use of such property damaged or destroyed where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance.[161]

[161] Unigard policy number 1-0436, Endorsement No. 2. The common language of these policies differs somewhat from that of the

In order to succeed on these motions for summary judgment, each of these defendants (except Lexington) must establish as a matter of law (1) that the initial exclusion applies and (2) that the exception to the exclusion does not apply. Lexington's policy contains no exception, and so it need only establish the first element.

The court will examine these elements independently. The first inquiry hinges on whether the damage for which coverage is sought was "directly or indirectly caused by seepage, pollution or contamination." The second question, concerning the exception, turns on whether the "seepage, pollution or contamination [was] caused by a sudden, unintended and unexpected happening during the period of this insurance."

In construing these insurance contracts, the court will accord the terms used their plain and ordinary meaning. Although ambiguous language must be construed in favor of the policyholder, the court will not distort the policy language to create ambiguity merely because the provision at issue may deny coverage. *Harrison v. MFA Mutual Ins. Co.*, 607 S.W.2d 137, 142 (Mo. 1980);

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so called "standard" pollution exclusion, an example of which reads as follows:

> This insurance does not apply:
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> * * *
>
> f) to *bodily injury* or *property damage* arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge dispersal, release or escape is sudden and accidental

Hartford Accident & Indemnity Company's and First State Insurance Company's Statement of Material Facts As To Which There Is No Genuine Issue, relating to motion for summary judgment that cleanup and response costs do not constitute damages, at Exhibit 3 (Hartford policy number 43 CF 11700E).

see Maryland Casualty Co. v. Huger, 728 S.W.2d 574, 579 (Mo. Ct. App. 1987).

A. *The Exclusion: No Coverage For Damage Caused By Seepage, Pollution Or Contamination*

The representative exclusion clause quoted above bars coverage for damage "directly or indirectly caused by *seepage, pollution or contamination.*" (Emphasis added) Plaintiffs contend that the exclusion is inapplicable here because Bliss' spraying did not constitute pollution. Plaintiff cites *Long Island Railroad v. Commercial Union Ins. Co.*, Fire & Casualty Cas. (CCH) 14 (E.D.N.Y. 1982) for the proposition that dispersal of hazardous material is not pollution when dispersed for a salutary purpose. Because Bliss sprayed the NEPACCO oil for the purpose of suppressing dust, plaintiff analogizes, it is not "pollution" within the meaning of the exclusion clause. The court disagrees.

The *LIRR* decision relies heavily on the specific language used in the standard form pollution exclusion clause, which bars coverage for damages "arising out of the discharge, dispersal, release or escape" of a number of specifically named forms of pollution. After examining the definitions of the terms "discharge," "dispersal," "release" and "escape," the New York federal district court concluded that, viewed as a whole, the pollution exclusion at issue did not apply to the periodic, scheduled application of herbicides.

The language of the pollution exclusions at issue here is broader. It excludes coverage for damage "directly or indirectly caused by seepage, pollution or contamination." Even if the court assumes that the railroad's use of herbicides in *LIRR* would not come within the scope of these broader terms, it may still find that Bliss' spraying of NEPACCO waste oil does. Unlike commercial herbicides, which the railroad sprayed along its right of way

to kill weeds, the oil sprayed on roads and horse arenas by Bliss was industrial waste. It was a by-product, not a product, of manufacturing, that Bliss was hired to dispose of, not to use.

Plaintiffs' argument that the court should consider Bliss' intention in spraying the roads suggests a construction of "pollution" far narrower than its plain and ordinary meaning. Webster's defines the verb "pollute": "to make physically impure or unclean." [162] To "contaminate," similarly, is "to soil, stain, corrupt, or infect by contact or association," or "to render unfit for use by the introduction of unwholesome or undesirable elements." [163] This court need not decide whether under any circumstances a party's intent may be relevant to whether damage has been caused by "pollution" or "contamination" to find that these considerations are not relevant here. Bliss' spraying of dioxin-tainted waste oil surely constitutes pollution and contamination within the common meaning of those terms.[164]

Plaintiffs also cite *Molton, Allen & Williams v. St. Paul Fire and Marine Ins. Co.*, 347 So.2d 95 (Ala. 1977), in arguing that this exclusion applies only to pollution arising out of industrial activity. In *Molton, Allen & Williams*, the court found that the pollution exclusion did not bar coverage for damage caused by the run-off of sand and dirt from a real estate development onto adjacent property. *Id.* at 99. Relying in part on the standard form pollution exclusion clause's reference to "specific industry-related irritants, contaminants and

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[162] Webster's Third New International Dictionary, 1756 (1981).

[163] *Id.* at 491.

[164] *Cf. Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374, 380-81 (N.C. 1986) (focus of pollution exclusion is on nature of the damage; discusses policy reasons).

pollutants," the court concluded that the exclusion was intended "to eliminate coverage for damages arising out of pollution or contamination by industry-related activities." *Id.*

The court notes initially that the pollution exclusion clauses contained in the policies at issue here are more broadly worded and do not contain the references to specific types of industry-related irritants, contaminants and pollutants relied on by the *Molton, Allen & Williams* court.

Even assuming that the pollution exclusion clauses at issue here are intended to apply only to industry-related pollution, the court views the damage alleged in the underlying cases as coming within their scope. The NEPACCO waste was produced as a by-product of manufacturing and the damages alleged are a result of its improper disposal. This industrially produced dioxin is not comparable to the disturbance of natural substances that was the basis for the underlying claims in *Molton, Allen & Williams.* The fact that the person hired to dispose of the waste used it in a separate, arguably non-industrial activity cannot alter its industrial origins.

Plaintiffs argue further that this case does not come within the pollution exclusion because that clause is intended to exclude coverage only for "actual" polluters. As support for reading this implied term into the contracts at issue here, plaintiffs cite a number of New York cases. The court will discuss each of these cases in considering whether Missouri courts would adopt either the "actual" or "active" polluter requirement.

Plaintiffs note that in an earlier opinion discussing whether all the defendants had a duty to indemnify plaintiffs, this court commented on plaintiffs' argument that the pollution exclusion clauses did not apply to IPC be-

cause it was not an "active" polluter.[165] In a footnote following a restatement of this argument, the court stated:

> Where the policy holder is not actually engaged in the pollution-causing activity, the exclusion clause does not apply. . . . IPC apparently did not generate or dispose of the waste material; it merely acted as an unfortunate intermediary in arranging for a hauler for the waste material generated by NEPACCO.

IPC v. Aetna, 654 F.Supp. at 1360 n.12 (citations omitted).

Plaintiffs do not acknowledge, however, the context in which these statements were made. As part of its discussions of defendants' duty to indemnify, the court noted three defenses, including the pollution exclusion clause, which upon a complete development of the facts could potentially release an insurer of its defense and indemnity obligations. The statements quoted above came as part of description of plaintiffs' counter-argument to the pollution exclusion defense and followed the court's explicit notice that these issues "are not decided at this time since to do so would be premature." *Id.*

The earliest of the line of New York cases supporting plaintiffs' actual polluter requirement is *Niagara County v. Utica Mutual Ins. Co.*, 80 A.D.2d 415, 439 N.Y.S.2d 538 (N.Y. App. Div. 1981), which is relied upon by each of the subsequent cases. The New York appellate court in *Niagara County* held that the municipal entity of Niagara County, a defendant in what became known as the "Love Canal" litigation, was not precluded from coverage by

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[165] Plaintiffs now argue that the exclusion applies only to "actual" polluters, dropping any reference to the "active" polluter distinction, even when citing authorities that use the "active" polluter—rather than the "actual" polluter—terminology.

the pollution exclusion. The court held that the exclusion applied only to actual polluters, basing this conclusion on the public policy underlying a New York statute requiring this exclusion. 439 N.Y.S.2d at 540-41. The court reasoned that allowing polluters to spread the risk of loss from polluting activity through liability insurance would undermine the effectiveness of New York's strict environmental standards. Although the statute has since been repealed, some courts have continued to follow the *Niagara County* precedent.

Missouri, however, has no similar statute. The court's task here is to discern the intent of the parties to these insurance contracts. If the language chosen by the parties is reasonably unambiguous, given its plain and ordinary meaning, the court will not look beyond it. Here, the principal language of the exclusion states quite clearly that damage "directly or indirectly caused by seepage, pollution or contamination" is not covered under the policy.[166] This language gives fair notice to a reasonable insured that its general coverage for all occurrences does not apply to damages from pollution.[167] This language does not suggest that coverage will turn on the directness or activeness of the insured's role in causing the seepage, pollution or contamination.

The pollution exclusion does take the insured's relationship to the polluting event into account in the exception clause that follows the language quoted above. The language of the exception does not consider whether the insured was directly ("actually") or actively involved in the pollution. It asks whether the "happening" that

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[166] For purposes of analytical clarity, the language and applicability of the exception to the pollution exclusion will be discussed separately below.

[167] The exception to the exclusion clause, discussed below, indicates that occurrences of seepage, pollution and contamination will be covered if they satisfy several conditions.

caused the seepage, pollution or contamination was "sudden, unintended and unexpected." [168]

In arguing that the court should read into the exclusion the requirement that the insured be an actual polluter, plaintiffs have offered no better reason than the decisions of other courts to do so, primarily in New York, under significantly different circumstances. As the discussion that follows will reveal, these cases do not provide any reason why the court should find such an implied condition in the contract of these parties. *See also* Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 Geo. L.J. 1237, 1268-1273 (1986) (criticizing courts' use of "actual"/"active" polluter concepts).

Autotronic Sys., Inc. v. Aetna Life and Casualty, 89 A.D.2d 401, 456 N.Y.S.2d 504 (N.Y. App. Div. 1982) is a more recent New York decision holding "that the pollution exclusion clause, mandated by statute, was intended to apply only to actual polluters." 456 N.Y.S.2d at 505 (quoting *Niagara County*). Like *Niagara County*, however, this case is based explicitly on the public policy underlying New York's statutory pollution exclusion requirement. *Id.* at 505-06.

Powers Chemco, Inc. v. Federal Ins. Co., No. 8462/85, slip. op. at 4 (N.Y. Sup. Ct. Apr. 3, 1987), issued since the statute requiring the pollution clause was repealed, adopts without explanation the ruling of the *Niagara County* court that the exclusion is applicable only to actual polluters. The opinion supplies no additional basis for this court to adopt such a requirement.

Plaintiffs also cite the decision of a federal district court applying Florida law in *Payne v. United States Fidelity & Guar. Co.*, 625 F.Supp. 1189 (S.D. Fla. 1985). The

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[168] The exception to the exclusion states that damage will be covered where the "seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening." The applicability of the exception will be analyzed separately below.

court in *Payne* found coverage, despite the exclusion clause, for governmental clean-up claims against the owner of property that was adjacent to the property of the actual polluter. The court supported its conclusion with two different rationales. The court noted that the insured had no role in the creation or disposal of the pollutants, but was merely an adjacent property owner, and cited the holding of *Niagara County* that the exclusion applies only to actual polluters. *Id.* at 1192.

In addition, the *Payne* court cited two other cases in which the polluting activity was found to come within the exception to the pollution exclusion. Both cases found that the standard form exception language "sudden and accidental" was satisfied where the polluting event was unintended and unexpected from the point of view of the insured. *Id.* at 1192-93. The court presented little analysis of these cases, instead concluding: "The facts of the instant case do fall within the ambit of the decisions in other jurisdictions which have construed the pollution exclusion clause." *Id.* at 1193.

The murkiness of the *Payne* decision's reasoning gives it little persuasive weight. The existence of an alternative basis for upholding the result further reduces the court's willingness to rely on the "actual" polluter rationale as a basis for finding coverage here.

Finally, plaintiffs cite a case in which the exclusion is read to bar coverage only for "active" polluters. In *United Pacific Ins. Co. v. Van's Westlake Union, Inc.*, 34 Wash. App. 708, 664 P.2d 1262 (Ct. App. 1983), *review den.*, 100 Wash.2d 1018 (Wash. 1983), the court found coverage for the owner of a service station whose underground gas pipe had leaked, causing the area to be closed to traffic for several weeks and giving rise to suits from a number of area businessmen for lost profits. Quoting the trial court opinion in *Niagara County*, 103 Misc. 814, 427 N.Y.S.2d 171, 174 (N.Y. Sup. Ct. 1980), the court

found that "the pollution exclusion was solely meant to deprive active polluters of coverage."

The decision in *Van's Westlake* also appears to be grounded on an additional rationale, that the standard form exception allowing coverage where the pollution was "sudden and accidental" provides coverage so long as the insured neither intended nor expected the harm to occur. *See* 664 P.2d at 1266 (citing *Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co.*, 186 N.J. Super. 156, 451 A.2d 990, 994 (N.J. Super Ct. Law Div. 1982) (pollution exclusion simply restates the definition of "occurrence")). The *Van Westlake* court's reliance on a second rationale to support its conclusion reduces the importance of the "active" polluter distinction to that case.

The "active" polluter formulation also differs from the "actual" polluter requirement adopted by the appellate court in *Niagara County*, and has been criticized by commentators. *See, e.g.*, 2 R. Long, *The Law of Liability Insurance* § 10A.02 at 10A-4 (limiting exclusion to "active" polluters is "unusual and novel interpretation and should not be followed"). The *Van's Westlake* court's apparent interest in taking into consideration the blameworthiness (or lack thereof) of the insured could have been directed to the language of the pollution exclusion exception. Under the exception, (on which the *Van's Westlake* court's additional rationale was based), coverage was available if the gas leak was "sudden and accidental" from the insured's perspective. *See* R. Long, *supra*, § 10A.02 at 10A-4 ("Coverage should have been found, if at all, because the spill was 'sudden and accidental,' thereby placing the occurrence outside the scope of the exclusion.") For all these reasons, the court does not believe that Missouri would adopt the "active" polluter requirement set forth in *Van's Westlake*, and will not follow it here.

Having reviewed the language of the first part of the pollution exclusion, and the above cases on which plain-

tiffs rely, the court concludes that this first part of the exclusion does apply, that is, that plaintiffs seek coverage for damages caused by "seepage, pollution or contamination." With regard to all but one of the defendants, this is merely the first part of the inquiry, as the court now must determine whether coverage is provided under the terms of the exception that follows the language discussed above in defendant's policies.

The policy of one insurer, however, does not contain any exception to the general pollution exclusion.[169] If the underlying damages alleged are the result of seepage, pollution or contamination, coverage is excluded. The court must therefore grant the motion of this defendant—Lexington—for summary judgment.

B. *The Exception: Coverage For Damage Caused By Sudden, Unintended and Unexpected Happenings*

Plaintiffs claim that their situation comes within the exception to the pollution exclusion. This exception has several requirements: the damage must have been caused by a happening that was (1) sudden, (2) unexpected and (3) unintended. Before the court can determine whether a "happening" meets these requirements, allowing coverage, the relevant "happening" must be identified.

Defendants argue that the relevant "happening" is Bliss' spraying of the waste oil to suppress dust. It was this spraying, they contend, that caused the pollution from which the underlying claims arose. Under this view, the court would next ask whether Bliss' spraying was "sudden, unintended and unexpected" from the point of view of the plaintiffs.

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[169] *See* Lexington policy number GC 5500212:

This Insurance does not cover any liability for:

(1) Personal Injury or Bodily Injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination.

Plaintiffs contend that the term "happening" refers not to Bliss' spraying but to the damage itself. They argue that even if both meanings are plausible, the court must accept the more favorable reading of such an ambiguous term. Plaintiffs conclude therefore that the court must analyze the applicability of the exception by asking whether the underlying damage was sudden, unintended and unexpected by plaintiffs.

Defendants argue that their reading is supported, and plaintiffs' reading undermined, by the causative role the policy language attributes to the "happening." To be covered, the damage must be "caused by a sudden, unintended and unexpected happening." The term "happening" cannot refer to the damage itself if it is the *cause* of that damage, defendants reason.

The court acknowledges that the term "happening" has a broad meaning.[170] Like the term "occurrence," which is used to define the broad range of events that generally are covered,[171] a "happening" can include not only the spraying itself but also other processes, such as leaching and flooding, by which dioxin can reach and cause harm to persons and property. The meaning of "happening" is not so broad, however, as to permit a construction which turns a causative agent into the thing caused, the damage itself. The court concludes that the object of the sentence must be a causative act or process, such as Bliss' spraying of the waste oil or the flooding of the Meramec river.

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[170] Webster's defines the noun "happening" simply as "occurrence." Webster's Third New International Dictionary 1031 (1981).

[171] In an earlier opinion the court quoted the definition of "occurrence" contained in the primary insurers' policies:

> Occurrence means an accident or happening or series of happenings arising out of or due to one event taking place during the term of this policy, including continuous or repeated exposure to the same conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the Insured.

Memorandum Opinion of March 30, 1987 at 3 (citation omitted).

It is apparent then that damage claims may have arisen from different "happenings," to which the pollution or contamination of different properties is attributable. For claims arising from properties that were directly sprayed by Bliss, that spraying may properly be considered the "happening" that caused the harmful seepage, pollution or contamination.

Other claims arose from properties that were not directly sprayed by Bliss but which were allegedly contaminated by more indirect means, such as the movement of dioxin-tainted soil and water drainage. The relevant happenings in such cases—that is, the activity that caused the seepage, pollution or contamination—could reasonably be either the original spraying or a subsequent process that produced the claimant's exposure as the contamination that produced the claimant's exposure [sic]; injury could not have occurred but for either of these two happenings.

The court notes that where language in an insurance contract is susceptible of more than one interpretation, the interpretation most favorable to the insured is to be adopted, especially where the clause attempts to exclude coverage under the policy. *Heshion Motors*, 600 S.W.2d at 537. This determination, however, can be made only on a claim-by-claim basis, by comparing the various occurrences which could qualify as the relevant happening. This issue, furthermore, will hinge on factual questions going to the merits of the underlying claims. The court has noted already that such findings are not appropriate here but must be made in the first instance by the courts of Missouri. *See* Memorandum Opinion of February 5, 1987 at 13-15.

The court, then, is unable to conclude as a matter of law that these other potential happenings were not "sudden, unintended and unexpected" from plaintiffs' standpoint. *Cf. Farm Family Mutual Ins. Co. v. Bagley*, 64 A.D.2d 1014, 409 N.Y.S.2d 294, 296 (N.Y. App. Div. 1978) (summary judgment for insurer reversed; excep-

tion to standard form pollution exclusion applies because "dispersal" may refer to original discharge or to secondary dissemination); *National Grange Mutual Ins. Co. v. Continental Cas. Ins. Co.*, 650 F.Supp. 1404, 1411-12 (S.D.N.Y. 1986) (applying New York law and quoting *Bagley;* insurer must defend against state Superfund action where defendant smelting company kept large quantities of by-product ash on plant site but did not intend that ash be released into environment).

In light of these critical factual issues, the summary judgment motions of Unigard, American Home, ISOP, American Re-Insurance, North Star, CNA, American Employers, Employers Commercial Union and certain London Market defendants [172] on grounds that coverage is barred by the pollution exclusion clause are denied.[173]

III. *Policies Governed By New York Law*

Certain underwriters at Lloyd's, London and certain London Market insurance companies (London Market defendants) have collectively filed a motion for summary judgment asserting that coverage for the underlying claims is barred under their excess policies' pollution exclusion clauses. Unlike the policies discussed above, certain London Market defendants' later-year policies state that they shall be interpreted according to New York law.

The court has indicated that so long as the law designated by a policy as controlling its application does not conflict with a fundamental policy of Missouri law, the contractual choice-of-law provision will be honored.

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[172] Certain London Market defendants' earlier-year policies do not contain language directing that they be interpreted under New York law. These policies are construed here under Missouri law.

[173] *Cf. United States v. Conservation Chem. Co.*, 653 F.Supp. 152, 160 (W.D. Mo. 1986) (approving Special Master's recommendation that summary judgment be denied in part because factual questions remain as to whether pollution was sudden and accidental; Special Master's reasoning given, 653 F.Supp. at 201-04).

Neither plaintiffs nor defendants have suggested that such a conflict exists here between the law of New York and Missouri. The Missouri courts have not previously addressed the application of such pollution exclusion clauses, nor is the court aware of any statutes or other authority reflecting a fundamental policy of Missouri law implicated by the resolution of this contractual dispute. The court, therefore, will resolve this issue according to the law of New York.

The language of these London Market defendants' pollution exclusion clauses is materially the same as that of the other defendants quoted above. Coverage is denied for damage "directly or indirectly caused by seepage, pollution or contamination," except "where such seepage, pollution or contamination is caused by a sudden, unintended or unexpected happening during the period of this insurance." Following the analysis used above, the court first will examine whether the general language of the pollution exclusion applies, and second whether plaintiffs qualify for coverage under the language of the exception.

Plaintiffs' argument that Bliss' spraying does not constitute pollution within the meaning of the pollution clause is no more persuasive under New York law than it is under Missouri law. As the court's discussion of Missouri law indicates, even if the *LIRR* precedent is taken as applicable to the language of the policies contested here, it does not suggest that individual waste does not pollute and contaminate merely because it is intentionally applied for an ostensibly constructive purpose. The other case cited by plaintiffs, *Molton, Allen & Williams*, is unpersuasive here for the same reasons given above with respect to Missouri law.

Plaintiffs' contention that the pollution exclusion clause does not apply to insureds that were not "actual" polluters requires a further examination of New York law. The court notes initially that a ruling by the New York Supreme Court, Appellate Division "is a datum for ascer-

taining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the State would decide otherwise." *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776, 1782 (1967) (citation omitted).

Two decisions of the New York Appellate Division have held "that the pollution exclusion clause, mandated by statute, was intended to apply only to actual polluters." *Niagara County*, 439 N.Y.S.2d at 540 (1981); *Autotronic Systems*, 456 N.Y.S.2d at 505 (1982). The applicability of these cases is in question, however, as the pollution exclusion clauses they interpret were required by a New York statute. In this situation, these courts reasonably looked to the public policy reflected by this statute as a guide to the exclusion's meaning. *Cf.* G. Couch, 2 *Couch on Insurance 2d* § 15:38 at 253 (Rev. ed. 1984) (public policy that is definite, well known, and clearly established may be invoked to aid in contract's interpretation) (citations omitted). None of the parties here have suggested that the pollution exclusions contained in the London Market defendants' policies were similarly required by this New York statute.[174] It is therefore not appropriate to read the intentions of the New York legislature into the private contracts of the parties here. Although public policy may serve as a guide to interpreting insurance provisions that have incorporated that policy, it cannot be used to change the meaning of a wholly private contract. *Id.* (public policy cannot be invoked to alter or amend a contract) (citations omitted).

Plaintiffs note that in *Powers Chemco*, slip op. at 4, a New York trial court recently interpreted a pollution exclusion clause as applying only to actual polluters, even though the statute requiring the exclusion had been re-

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[174] The language of the exclusions at issue here varies somewhat from that analyzed in the cases cited above.

pealed. This opinion, however, does not explain the basis for its decision, but merely cites to *Niagara County* and *Autotronic Systems*. This unreported decision is neither controlling nor persuasive. The court concludes then, that under New York law, the first part of the pollution exclusion applies here.

The second part of the court's analysis asks whether under New York law coverage is still available to plaintiffs under the pollution exclusion exception. Having reached this point, the court is again confronted with the need to identify each relevant "happening" that caused seepage, pollution or contamination leading to claims. The pollution exclusion exception allows for coverage "where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening."

New York courts have interpreted similar language—allowing coverage "if such discharge, dispersal, release or escape [of pollutants] is sudden and accidental"—to provide coverage where the *damage* asserted in the underlying claims was unintended. *See Allstate v. Klock Oil*, 73 A.D.2d 486, 426 N.Y.S.2d 603, 605 (N.Y. App. 1980). Although *Klock Oil* construes language that varies from the language of the pollution exclusion exceptions at bar, there is every reason to believe that the New York courts would treat these clauses the same. In *Klock Oil*, the court effectively reads the word "sudden" out of the policy. *See* 426 N.Y.S.2d at 605. "Accidental" is interpreted to mean "unexpected, unusual and unforeseen," and these conditions are said to be satisfied where there is no intent to cause harm. *Id.*

Since London Market defendants have not demonstrated as a matter of law that the damages alleged by the underlying claimants were intended by the plaintiffs, the court cannot grant their motion for summary judgment on the ground that it is coverage excluded under the

"sudden, unintended and unexpected" language of the exception.[175]

Finally, with regard to its post-1974 policies, London Market defendants argue that coverage is precluded by the further requirement of the exception that the "seepage, pollution or contamination is caused by a sudden, unintended or unexpected happening *during the period of this insurance*." These defendants contend that all of the causes of pollution in the underlying claims had occurred prior to January 1, 1975. Consequently, they argue, there could be no "happening" during the period of the insurance for their post-1974 policies.

This argument is premised on a view that the relevant happenings are limited to Bliss' spraying or the intentional movement of contaminated soil, as occurred at the Minker/Stout site. As the court has already explained above, however, claims arising from property not directly sprayed by Bliss, or which did not receive soil that Bliss had sprayed, may result from happenings that are natural processes or events, such as the run-off of contaminated soil or the flooding of the Meramec River.

These defendants have not shown as a matter of law that such happenings did not occur during the periods of their post-1974 policies. Consequently, their motions for summary judgment cannot be granted on this basis.[176]

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[175] *Cf. New York v. INA Underwriters Ins. Co.*, 133 Misc.2d 430, 507 N.Y.S.2d 112, 115 (N.Y. Sup. Ct. 1986) (denying motion to dismiss; "The precise cause of the spill and whether it was sudden and accidental will be a determination for the trier of facts.").

[176] The London Market defendants' arguments with regard to those policies that had expired *prior* to the contamination of the Minker/Stout and Times Beach sites are addressed *supra* at section 7 (Policies Claimed To Have Expired Prior To Contamination At Specific Sites).

IV. *Summary*

Lexington's motion for summary judgment based on its pollution exclusion clause is granted. All other defendants' motions for summary judgment based on a pollution exclusion clause are denied.

11. *PUNITIVE DAMAGES*

Seven motions have been filed by numerous defendants [177] seeking partial summary judgment declaring that their policies do not provide coverage for punitive damages. The various defendants' policies contain different language, but their arguments generally coincide, proceeding on three grounds. First, those defendants whose policies contain language specifically addressing punitive damages argue that this language excludes all coverage for punitives here. Second, all defendants except London Market defendants argue that punitive damages are not encompassed within their policies' general coverage language. Finally, defendants contend that even if the policy language provides coverage for punitive damages, such insurance would be void as against public policy.

Plaintiffs respond to these arguments as follows: (1) that this issue is not ripe and involves factual questions that need to be resolved in the underlying cases, (2) that eight of these defendants have waived this defense, (3) that the specific punitive damages language defendants point to does not apply here, (4) that the policies' general coverage language is broad enough to include punitive damages, and (5) that public policy does not prohibit insuring against punitive damages in the con-

[177] The defendants listed in each of these seven motions are listed below: (1) CNA, North Star, Hartford, First State, Continental Ins., Harbor, U.S. Fire, Stonewall, American Employers, Employers Commercial Union, American Re-Insurance and Unigard; (2) American Employers and Employers Commercial Union; (3) American Home, ISOP and Lexington; (4) London Market defendants; (5) INA; (6) Travelers; and (7) Aetna.

text of this case. Before proceeding to examine these arguments more closely, the court must first determine what law to apply.

I. *Choice of Law*

The court has stated earlier that, in general, issues rooted in the interpretation of the insurance policies will be determined according to the law of Missouri, largely because Missouri was the location of the primary insured risk. *See* section 1 (Waiver of Defenses) part II (Choice of Law Principles). The court also noted, however, that policy language designating the law of a particular state as controlling would be honored, absent a fundamental conflict with Missouri law. *Id.*

Recognizing that the purpose of punitive damages is to punish the offending parties and to deter them and others from similar conduct in the future, *Schnuck Markets, Inc. v. Transamerica Ins. Co.*, 652 S.W.2d 206, 209 (Mo. Ct. App. 1983), and noting that the underlying suits arose from conduct that took place in Missouri and allege damage to the State and residents of Missouri, the court finds that the law of Missouri will govern the question of whether the defendants' policies (which do not designate some other law) provide coverage for punitive damages.

Certain defendants [178] represent that at least some of their policies contain a choice-of-law provision, designating New York law as controlling the policies' interpretation. As the discussion that follows will show, there is no fundamental conflict between the law of Missouri and that of New York on this issue. Accordingly, the motions of these defendants, with respect to those policies containing a provision designating New York law, will be determined under New York law.

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[178] INA, U.S. Fire and London Market defendants.

II. *Factual Disputes*

Plaintiffs assert that defendants' motions are premature and involve factual questions that must first be resolved by the Missouri courts that are handling the underlying claims. The court disagrees. It is true that until the underlying cases are decided, this court cannot determine whether plaintiffs are liable for punitive damages, and whether such liability will be based on their own conduct or will be vicarious, resulting from the actions of Russell Bliss. This uncertainty however, does not prevent the court from resolving these strictly legal issues prior to the underlying factual findings, since any finding of punitive damages will be limited to one of these two bases. Nor does the court find any material issue of fact in the "disputes" suggested by plaintiffs. These motions are ripe for summary judgment.

III. *Waiver*

Before proceeding with an analysis of defendants' asserted grounds for summary judgment, the court will examine plaintiffs' claim that defendants Aetna, American Home, CNA, INA, ISOP, Lexington, Unigard and U.S. Fire waived this defense by failing to raise and specify the grounds for this defense in a timely fashion.

The court has determined earlier that under the law of Missouri, insurance coverage cannot be "created" by waiver. *See supra* section 1 (Waiver of Defenses) part IV.B (Aetna Pollution Exclusion Defense) (no waiver of pollution exclusion defense). This analysis bars a waiver of the punitive damages defense as well, under the reasoning described above. An insured does not have a "pre-existing right" to coverage for punitive damages that could be protected by waiver, under a policy that specifically excluded such damages, or which simply did not provide for them in any case. Nor have plaintiffs established either (1) that they were prejudiced by any delay in learning of these defendants' intention to assert

this defense or (2) that any of these defendants intended to waive the defense, as required under Missouri waiver law. *See id.* (no waiver unless affirmative intention to waive defense or some element of estoppel present). Plaintiffs' waiver argument must fail under Missouri law then, with respect to the motions of Aetna, American Home, CNA, Lexington and Unigard, and the primary policies of INA. The excess policies of INA, U.S. Fire and certain excess policies of London Market defendants, however, specify that they are to be governed by New York law.[179]

In its earlier analysis of plaintiffs' motion for summary judgment on waiver grounds, the court determined that under New York law, an insurer is required to give prompt notice to its insured of its intention to deny coverage. *See* section 1 (Waiver of Defenses) part III.D (U.S. Fire Misrepresentation and Fraud Defenses) (citing N.Y. Ins. Law Art. 34 § 3420(d) (McKinney 1985)). This requirement becomes applicable to excess insurers, the court further determined, only once the underlying primary coverage has been exhausted. *Id.* Since plaintiffs have not shown that the underlying coverage was exhausted when they first learned of INA and U.S. Fire's intention to deny coverage for punitive damages, their claim of waiver must fail.

Finally, plaintiffs have offered no evidence to suggest any conflict of fundamental policy between the law of New York and Missouri on this issue—nor is the court aware of any.

IV. *Explicit Exclusions*

Plaintiffs concede that two policies of the London Market defendants contain broad provisions excluding coverage for "fines, penalties, punitive or exemplary dam-

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[179] These policies follow the form of certain CIRCL policies which contain a choice of law provision.

ages," and do not contest their claim that no coverage for punitive damages is provided under these policies.[180]

Lloyds' Certificate number 57580, for example, contains the following provision:

> SPECIAL CONDITIONS
>
> * * *
>
> 3. Punitive and Exemplary Damages Exclusion Clause:
>
> Regardless of any other provision of this insurance, this insurance does not apply to punitive or exemplary damages.

The court concludes, therefore, that policies # 57579 and # 57580 of the London Market defendants do not provide coverage for punitive damages; the motion of these defendants to that effect is granted.

Most of the remaining defendants claiming explicit punitive damage exclusions, however, cite to language barring coverage for punitive or exemplary damages within a broader pollution exclusion.[181] Unlike the independent exclusions in the two London Market defendants' policies noted above, the exclusions cited by most of these defendants appear under the title "SEEPAGE, POLLUTION AND CONTAMINATION EXCLUSION" or something similar.

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[180] London Market defendants' policy number 57579 and # 57580.

[181] London Market defendants policy number 870/AO399820011, #870/AO399820012, #870/A2066, #870/A2067, #33511, #58275, #32806, #32807, #29965, #29964, #56491, #56492, #72 DD 258C, #LC 62735, #LC 62736, #LC 62737, #LC 62738; Lexington #GC 5500212; CNA #RDU 9223936, #RDX 899-19-58; Unigard #1-0436; ISOP #4172-5181; Employers Commercial Union #EX-8592-001, #EX-8592-002; First State #920430; American Home #CE-2691802; North Star #NSX 10161; Stonewall #EP 45490, #45491; American Re-Insurance #M 0091884; American Employers #AW-8500-490, #AW-8500-491.

Twenty-eight remaining defendants' policies contain language comparable to the following: [182]

INDUSTRIES SEEPAGE, POLLUTION AND CONTAMINATION CLAUSE NO. 3

(Approved by Lloyds' Underwriters' Non-Marine Associations)

This Insurance does not cover any liability for:

(1) Personal Injury or Bodily Injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination, provided always that this paragraph (1) shall not apply to liability for Personal Injury or Bodily Injury or loss of or physical damage to or destruction of tangible property, or loss of use of such property damaged or destroyed, where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this Insurance.

(2) The cost of removing, nullifying or cleaning-up seeping, polluting or contaminating substances unless the seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance.

(3) Fines, penalties, punitive or exemplary damages.

This Clause shall not extend this Insurance to cover any liability which would not have been covered

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[182] London Market defendants policy number 870/AO399820011, #870/AO399820012, #870/A2066, #870/A2067, #29965, #29964, #56491, #56492, #72 DD 258C, #LC 62735, #LC 62736, #LC 62737, #LC 62738; Lexington #GC 5500212; Unigard #1-0436; CNA #RDU 9223936, RDX 889-19-58; ISOP #4172-5181; Employers Commercial Union #EX-8592-001, #EX-8592-002; First State #920430; American Home #CE-2691802; North Star #NSX 10161; Stonewall #EP 45490, #EP 45491; American Re-Insurance #M 0091884; American Employers #AW-8500-490, #AW-8500-491.

under this Insurance had this Clause not been attached.

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N.M.A. 1685 [183]

Four others contain a different type of formulation: [184]

SEEPAGE, POLLUTION AND CONTAMINATION

In consideration of the premium charged it is hereby understood and agreed that such insurance as is afforded hereunder does not cover any liability for:

(1) removal of loss or damage to subsurface oil, gas or any other substance, the property of others, resulting from seepage, pollution and/or contamination except that with respect to liabilities arising directly from operations on land this Paragraph (1) shall not apply to any liability which would otherwise be covered under this insurance for such removal, loss or damage directly attributable to blowout, cratering or fire of an oil or gas well owned or operated by or under the control of, the Assured.

(2) loss of, damage to, or loss of use of property resulting from seepage, pollution and/or contamination directly or indirectly resulting from subsidence caused by subsurface operations of the Assured.

(3) Personal Injury or Bodily Injury or loss of, damage to, or loss of use of property directly or indirectly caused by seepage, pollution or contamination, except that with respect to liabilities arising directly from operations on land this

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[183] Plaintiffs' Appendix of Policy Provisions on Punitive Damages Issue, Tab 15 (Lloyds' Policy number 870/A2067) (emphasis added).

[184] London Market defendants policy number 33511, #33511, #32806, #32807.

Paragraph (3) shall not apply to liability for Personal Injury or Bodily Injury or loss of or physical damage to or destruction of tangible property, or loss of use of such property damaged or destroyed, where such seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance.

(4) The cost of removing, nullifying or cleaning up sweeping, polluting or contaminating substances, except that with respect to liabilities arising directly from operations on land this Paragraph (4) shall not apply if the seepage, pollution or contamination is caused by a sudden, unintended and unexpected happening during the period of this insurance.

(5) Fines, penalties, punitive or exemplary damages incurred as a result of seepage, pollution and/or contamination.

This clause shall not extend this insurance to cover any liability which would not have been covered under the insurance had this clause not been attached.[185]

Plaintiffs argue that these punitive damage exclusions apply only where the pollution exclusion also applies. This result follows, they contend, from the placement of the punitive damages language within the pollution exclusion. Defendants assert that the exclusion is not so limited, pointing to the unconditional language used in its more common version.

Reading these punitive damage exclusions within the context of the pollution exclusion clauses, the court concludes that they unambiguously bar coverage for punitive

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[185] Plaintiffs' Appendix of Policy Provisions on Punitive Damages Issue, Tab 19 (Americas Insurance Company policy number 20780) (emphasis added).

damages in this case. The court does not read the placement of this language within the pollution exclusion clause to require that all of the terms of the pollution exclusion itself be satisfied before the puntitive damages exclusion applies. Rather, the court understands this placement to require only that the first part of the pollution exclusion clause analysis must be satisfied—that is, that the punitive damages must result from seepage, pollution or contamination—for the punitive damages restriction to apply. Although this condition must be implied in the provisions like the one quoted first above, it is explicitly incorporated into second example, which bars punitive damages "incurred as a result of seepage, pollution and/or contamination."

Given this exclusion's placement within the pollution exclusion clause, an insured reasonably might not expect such a bar on punitive damages to apply to all types of claims; its application to claims resulting from pollution, however, is clear. The court has already stated its conclusion that the claims underlying this suit arose from "seepage, pollution or contamination." [186] This exclusion, therefore, applies to the claims underlying this suit.

Accordingly, the court grants the motions for partial summary judgment of those defendants whose 34 policies contain these exclusions.[187]

Defendants' twenty-four remaining policies do not contain any language explicitly addressing coverage for punitive damages. The arguments of these defendants that punitive damages do not come within the general coverage provisions of their policies is addressed below.

V. *General Coverage Language*

The 24 remaining policies contain different language formulations indicating the general scope of insurance

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[186] *See* section 10 (Pollution Exclusion) part II.A.

[187] *See supra* note 181.

coverage. Plaintiffs classify these formulations as falling into three types, although certain policies contain or incorporate the language of more than one type.

One type is referred to as the "all sums . . . because of" provision:

> The Company will pay on behalf of the Insured *all sums which the insured shall become legally obligated to pay as damages because of*
>
> A. *bodily injury* or
>
> B. property damage
>
> to which this insurance applies, caused by an occurrence . . .[188]

The fifteen primary insurance policies contain this language.[189]

A second formulation, referred to as the "imposed . . . by law" provision, reads as follows:

> The Company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Insured for *all sums which the Insured shall be obligated to pay* by reason of the liability
>
> (a) *imposed upon the Insured by law*,
> or
>
> (b) assumed under contract or agreement by the Named Insured and/or any officer, director, stockholder, partner or employee of the Named

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[188] Plaintiffs' Appendix of Policy Provisions on Punitive Damages Issue, Tab 1 (INA policy number SCG 1877) (emphasis added).

[189] Continental Ins. policy number CBP 71779, #CBP 75485; Travelers #T-NSL-951040-70; Hartford #21 CD 18100E, #43 CF 11700E; Aetna #39 AL 218033 SCA, #39 AL 218804 SCA, #39 AL 219851 SCA, #39 AL 219857 SCA, #39 AL 219867 SCA, 39 GL 5 SCA, #39 GL 14 SCA; INA #SCG 1443, #SCG 1775, #SCG 1877.

> Insured while acting in his capacity as such, *for damages on account of*
>
> (i) Personal Injuries
>
> (ii) Property Damage,
>
> (iii) Advertising Liability
>
> caused by or arising out of each occurrence happening anywhere in the World during the policy period." [190]

Plaintiffs represent that three of the remaining excess policies contain or incorporate this or similar language or follow the form of an underlying policy in which this language is found.[191]

Finally, plaintiffs suggest a third category of policies, which cover "ultimate net loss." An example of such a provision reads as follows:

> INSURING AGREEMENT
>
> 1. The Company hereby indemnifies the Insured against ultimate net loss in excess of and arising out of the hazards covered and as defined and in excess of the underlying insurance as shown in Item 4 of the Declarations (hereinafter referred to as "underlying insurance") but only up to an amount not exceeding the limit(s) shown in Item 5 of the Declarations.

"Ultimate net loss" is subsequently defined as follows:

> 13. Ultimate net loss, as used herein, shall be understood to mean the sums paid in the settlement of losses for which the Insured is liable after making deductions for all recoveries, salvages and other in-

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[190] Plaintiffs' Appendix of Policy Provisions on Punitive Damages Issue, Tab 32 (Harbor policy number 129791) (emphasis added).

[191] Harbor policy number 129791; ISOP #4175-6347; American Home #CE 3591496.

> surances (other than recoveries under the underlying insurance, policies of co-insurance, or policies specifically in excess hereof), whether recoverable or not, and shall exclude all "Costs".[192]

Plaintiffs represent that four of the remaining excess policies either contain this ultimate net loss" formulation or follow the form of an underlying policy containing this language.[193]

An additional form of general coverage language is incorporated into the two remaining policies,[194] which uses the phrase "ultimate net loss" in conjunction with the "imposed . . . by law" language:

> The Company agrees to pay on behalf of the insured the *ultimate net loss* in excess of the retained limit hereinafter stated, which the insured may sustain by reason of the liability *imposed upon the insured by law*, arising out of an occurrence or assumed by the insured under contract, for:
>
> (a) Personal Injury Liability,
>
> (b) Property Damage Liability, or
>
> (c) Advertising Liability [195]

Plaintiffs argue that each of these formulations provides coverage for punitive damages, while defendants

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[192] Plaintiffs' Appendix of Policy Provisions on Punitive Damages Issue, Tab 11 (U.S. Fire policy number 522-0053199) (emphasis added); *see also id.* at Tab 64 (American Re-Insurance #M 0091884) (same language used).

[193] U.S. Fire policy number 522-0055647, #522-0055656, #552-0053199; INA #XCP 143633.

[194] INA policy number XCP 144367, U.S. Fire #522-0053208.

[195] Plaintiffs' Appendix of Policy Provisions on Punitive Damages Issue, Tab 8 (CIRCL policy number CHAF 821) (emphasis added); *see* Plaintiffs' Rule 108(h) Statement In Response to Defendants' Seven Motions for Partial Summary Judgment On The Punitive-Damages Issue at 42-44.

contend that they do not. In assessing these arguments, the court will apply Missouri law to those policies not containing or incorporating a contrary choice-of-law provision.[196] All of the policies containing or incorporating the "all sums" and "imposed . . . by law" formulations are governed by Missouri law. Some of the policies containing or incorporating the "ultimate net loss" formulation and the "imposed . . . by law *and* "ultimate net loss" formulation are governed by Missouri law and some by New York law.

A. *Missouri Law*

In *Schnuck Markets, Inc. v. Transamerica Ins. Co.*, 652 S.W.2d 206 (Mo. Ct. App. 1983), a Missouri appellate court ruled that policy language comparable to the "all sums" language quoted above did not include provide coverage for punitive damages. The court relied primarily on the 1964 decision of another Missouri appellate court, *Crull v. Gleb*, 382 S.W.2d 17, which summarily reached the same conclusion,[197] while enunciating a new rationale to support this result.

The policy language in *Schnuck Markets* promised insurance payments for "all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage . . . ." The court found the policy to insure only "damages for bodily injury or

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[196] Only the remaining excess policies of INA and U.S. Fire contain or incorporate a choice-of-law provision. They will be interpreted, as the choice-of-law provision directs, according to New York law.

[197] The court's decision in *Crull* was also based on its conclusion that insurance for punitive damages in that case was void as against Missouri public policy. *See id.*, 382 S.W.2d at 23. *See also American Family Mutual Ins. Co. v. Nickerson*, 657 F.Supp. 2, 6 (E.D. Mo. 1986) (concluding policy with "all sums" formulation provided no coverage for punitive damages under Missouri law, citing *Schnuck Markets* and *Crull*), *aff'd on other grounds*, 813 F.2d 135 (8th Cir. 1987).

property damage," which it distinguished from punitive damages. Damages for bodily injury or property damage are compensatory damages, the court noted, while punitive damages are of a different sort, and so do not come within the covered categories. *See Schnuck Markets*, 652 S.W.2d at 209-10.

The *Schnuck Markets* court also noted another Missouri appellate court decision, *Colson v. Lloyd's of London*, 435 S.W.2d 42 (1968), which had commented on *Crull* while finding coverage for punitive damages under the policy at issue there. The policy in *Colson* was "False Arrest Insurance" for the Sheriff of Bates County, Missouri. That policy covered "against loss by reason of liability imposed by law upon the assured, by reason of any false arrest, assault and battery, ..." The *Colson* court contrasted its policy, which provided coverage for liability "imposed by law" arising out of certain types of acts (e.g. false arrest), with the policy in *Crull*, which provided coverage for "damages" arising out of certain types of injury.[198]

Relying on these two precedents, the court in *Schnuck Markets* reached a consistent result, focusing its analysis on the language of the "all sums" policy language stating coverage for "*damages* because of bodily injury."

Plaintiffs rely on *Colson* and a 1934 federal court of appeals decision, *Ohio Cas. Ins. Co. v. Welfare Finance Co.*, 75 F.2d 58 (8th Cir. 1934), in arguing for coverage under the "all sums" policy language. The policy in *Welfare Finance* insured "against loss by reason of liability imposed by law upon the assured for damages on account of bodily injury . . . ." The federal court focused on the "liability imposed by law" language, as the *Colson* court had, rather than the term "damages," which drew the attention of the court in *Crull*. The federal court held

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[198] The *Colson* decision also differed from *Crull* in concluding that insuring law enforcement officers against punitive damages was not contrary to Missouri public policy. *See Colson*, 435 S.W.2d at 47.

that the policy covered punitive damages assessed in connection with the same negligent activity that resulted in bodily injury. *Id.* at 59.[199]

Although this court must give appropriate weight to a decision of the Eighth Circuit Court of Appeals, as the "home" circuit, in interpreting the law of Missouri, *see Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 125-26 (D.C. Cir. 1986), all federal courts must first look to the decisions of the Missouri courts in determining Missouri law. Since *Welfare Finance*, the appellate courts of Missouri have issued the three decisions discussed above. To the extent that these decisions are inconsistent with a federal court's prior interpretation of Missouri law, they must prevail. *See Abex Corp.*, 790 F.2d at 126 n.30 (noting that deference to home circuit court's decision affected by state court decisions issued after it); *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S.Ct. 1776, 1782 (1967) (ruling of state intermediate appellate court is datum for determining state law).

Finding *Schnuck Markets* to be dispositive with regard to the "all sums" policies, the court will grant the motions for partial summary judgment with regard to those policies of defendants which contain or incorporate the "all sums" formulation.[200]

The court finds, furthermore that the "imposed . . . by law" formulation follows essentially the same structure as the "all sums" formulation. Each of these two formulations begin with the same description of coverage for "all sums which the insured shall be obligated to pay." The "all sums" policies continue: "as damages because of bodily injury . . . ." The "imposed . . . by law" policies

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[199] The *Welfare Finance* decision also found no public policy prohibition against punitive damages insurance for an employer who played no part in the wrongful acts of his employee. *See id.*, 75 F.2d at 60.

[200] *See infra* note 189.

contain two intervening clauses and then continue: "for damages on account of personal injuries . . . ." The two intervening clauses serve only to indicate that there are two ways for the insured to become "obligated to pay"—(a) sums may be "imposed upon the insured by law" or (b) sums may be "assumed under contract or agreement." These clauses do not alter the basic structure of the general coverage language and leave these policies comparable to the policy at issue in *Schnuck Markets* and governed by that precedent.

The court finds the "imposed . . . by law" policies to provide no coverage for punitive damages under Missouri law, and grants the motions for partial summary judgment with respect to those policies.[201]

Plaintiffs have suggested to the court another category of policies, which are said to follow the "ultimate net loss" formulation. Upon a review of these policies, however, the court has found that each incorporates an underlying policy which contains provisions comparable to either the "all sums" or "imposed . . . by law" formulations. The court concludes that the phrase "ultimate net loss" does not operate to expand the scope of coverage defined by the underlying policies. Instead, this language acts as a shorthand reference used in these excess policies to refer to the insurer's final liability, which is defined by the underlying policies.

U.S. Fire policy number 522-0053199, for example, states: "The Company hereby indemnifies the Insured against Ultimate net loss in excess of and arising out of the *hazards covered and as defined in excess of the underlying insurance* . . . ." [202] The CIRCL policies, whose form is followed by several other policies, provides another example. The general coverage provision states that it in-

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[201] *See infra* note 191.

[202] Plaintiffs' Appendix of Policy Provisions on Puntive Damages Issue, Tab 11 (emphasis added).

sures for "ultimate net loss . . . which the insured may sustain by reason of the liability imposed upon the insured by law . . . for (a) Personal Injury Liability . . . ." On the next page, ultimate net loss is defined as "all sums which the insured . . . is obligated to pay as damages . . . because of personal injury . . . ." [203]

The court finds that the "ultimate net loss" formulation, like the "imposed . . . by law" formulation, is equivalent to an "all sums" formulation, and is governed by the same Missouri precedent. Consequently, the court finds that the single policy in this group that is governed by Missouri law [204] does not provide coverage for punitive damages under the reasoning given above. The policies governed by New York law are analyzed below.

Finally, a fourth category is suggested by plaintiffs. This group of policies contains or incorporates general coverage language that refers both to "ultimate net loss" and to damages "imposed . . . by law." Having reviewed these policies, the court finds that the ultimate net loss terminology is not used to define the scope of coverage but provides a short hand method for referring to the insurer's final liability under the policy. It is the "imposed . . . by law" language that operates to define the scope of general coverage provided by the policy. These policies, then are interpreted the same as the "imposed . . . by law" policies discussed above. All three of these policies are governed by New York law and are discussed below.

B. *New York Law*

The court has determined that policies containing or incorporating a choice-of-law provision designating New York law are to be interpreted according to the law of

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[203] Plaintiffs' Appendix Of Policy Provisions on Punitive Damages Issue, Tab 8 (CIRCL policy number CHAF 821).

[204] CNA policy number RDX 889-19-58.

New York.[205] Unfortunately, there is very little case law in New York discussing whether policy language similar to that at issue in this case includes coverage for punitive damages. One case, however, provides some guidance.

In *Hartford Acident and Indemnity Co. v. Village of Hempstead*, 48 N.Y.2d 218, 397 N.E.2d 737, 422 N.Y.S.2d 47 (1979), the New York Court of Appeals considered whether New York public policy allowed insurance coverage of punitive damages for two police officers of the Village of Hempstead. The policy at issue contained the "all sums" formulation, promising payment for "all sums which the insured shall become legally obligated to pay as damages because of bodily injury." *Id.*, 422 N.Y.S.2d at 50 n.4.[206]

The Court of Appeals noted that the trial court, "construing the ambiguous wording of the policy against the insurer, held that the policy covered the action." *Id.*, 422 N.Y.S.2d at 49. In a footnote, the *Village of Hempstead* court elaborated, stating that "Though [the trial court's] decision did not expressly pass upon whether the policy language was broad enough to cover punitive as well as compensatory damages, Special Term impliedly so held for the public policy issue need have been reached only if the policy coud be interpreted to cover such damages."[207] *Id.*, 422 N.Y.S.2d at 50 n.4. The intermediate

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[205] Six such policies remain after the policies with explicit punitive damages exclusions are eliminated: INA policy number XCP 144363, #XCP 144367; U.S. Fire #522-0055647, #522-0055656, #522-0053199, #522-0053208.

[206] The Court of Appeals, in dicta, noted that "the conclusion [whether the policy covered punitive damages] turn[s] on whether one emphasizes the words "bodily injury" (and thus excludes punitive damages), or the words "all sums" (and thus includes punitive damages)." *Id.*, 422 N.Y.S.2d at 50 n.4.

[207] The Court of Appeals noted further, however that it did not reach that question, "since the parties have argued only questions of public policy and statutory application." *Id.*, 422 N.Y.S.2d at 50 n.4.

appellate court affirmed the trial court decision unanimously and without opinion. *Id.*, 422 N.Y.S.2d at 49.

The court notes that the majority of states that have considered this issue have found coverage for punitive damages in such general coverage language as the "all sums" and "imposed . . . by law" formulations.[208] Defendants have offered no New York authority supporting a finding of noncoverage for punitive damages.

The court finds that this result does not present a conflict with any fundamental policy of Missouri. Rather, the different results reached under Missouri and New York law merely reflect a different interpretation of private contract language. As such, the parties' choice of New York law with respect to certain policies can be honored in harmony with conflict-of-law principles.

In light of these considerations, the court finds that under New York law, the general coverage formulations at issue in this case provide coverage for punitive damages. Defendants' motions for partial summary judgment, then, cannot be supported on this ground.

VI. *Public Policy*

The court above has concluded that punitive damages are not covered by those policies that contain or incorporate (1) explicit independent punitive damage exclusions, (2) punitive damage exclusions within pollution exclusion provisions, or (3) any of the general coverage language formulations governed by Missouri law. For these policies, no coverage is provided for punitive damages whether the punitive damages are assessed against plaintiffs for their own conduct or are imposed because of plaintiffs' vicarious liability for the acts of Russell

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[208] K. Redden, *Punitive Damages*, 685 (1980) (citations omitted). *See generally* Annotation, *Liability Insurance Coverage As Extending to Liability for Punitive or Exemplary Damages*, 16 A.L.R.4th 11 (1982).

Bliss. The court has found punitive damages coverage, however, under those general policies subject to New York law that did not contain or incorporate some explicit punitive damages exclusion.

Defendants now argue that the public policy of Missouri and New York prohibits insurance coverage for punitive damages. With regard to insuring the actor whose conduct is the object of the punitive damages, the law of both Missouri and New York is clear and consistent. Such insurance is contrary to public policy as it defeats the very purpose of such punitive damages—to punish the actor and deter others from similar conduct. *See Crull v. Gleb*, 382 S.W.2d at 23; *Village of Hempstead*, 422 N.Y.S.2d at 54 (government insureds); *Padavan v. Clemente*, 43 A.D.2d 729, 350 N.Y.S.2d 694, 697 (N.Y. App. Div. 1973 (nongovernmental insureds).

With regard to those policies governed by New York law which do not contain or incorporate some explicit punitive damages exclusion, the court finds the punitive damages coverage provided under those policies to be void as contrary to public policy, but only to the extent such punitive damages are assessed as a result of the direct conduct of the plaintiffs and not as a result of plaintiffs' vicarious liability for the actions of Russell Bliss. The court grants the motions for partial summary judgment with regard to those policies to that limited extent.

With regard to insuring a party against vicarious liability for punitive damages, the law of both Missouri and New York is less well developed. As noted earlier, the Eighth Circuit in *Welfare Finance* found no public policy prohibition against such insurance for vicarious punitive damages liability. 75 F.2d at 60.[209] No other

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[209] *Cf.* K. Redden, *supra* note 208 at 680 & n.2, 691 & n.50. ("It is generally accepted that public policy does not prevent the employer's insurance from covering [vicarious punitive damages] liability.")

Missouri or New York decisions have been cited by either side discussing this point.[210]

The court notes that the rationale upon which the Missouri and New York courts invalidated such insurance of persons directly liable does not apply to entities held vicariously liable for punitive damages. Neither the punishment nor the deterrence objective is advanced by preventing parties not directly culpable from shifting the burden of this liability. This being so, the *Crull* and *Village of Hempstead* cases are not applicable here, and the court—once again—finds no basis to invalidate such insurance under either the law of Missouri or New York. *See IPC v. Aetna*, 654 F.Supp. at 1361 (no public policy bar to insurance for punitive damages liability). Defendants' motions for partial summary judgment, to this extent, cannot be based on grounds of public policy.

V. *Summary*

The motions for partial summary judgment of defendants whose policies contain an express exclusion of punitive damages, either independent or within a pollution exclusion provision, are granted. The motions of those defendants whose remaining policies are governed by Missouri law are granted on the grounds that their general coverage language does not include punitive damages. The motions of those defendants whose remaining policies are governed by New York law are *not* granted on general coverage language grounds.

Finally, the public policy of both Missouri and New York prohibits insurance coverage for direct liability for

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[210] The *Village of Hempstead* decision recognized this distinction but did not address it, noting that "the fact that the village [as employer of the police officers] is not a party defendant in the action makes it unnecessary for us to decide whether, as some authorities have held or suggested, there is a different public policy concerning insurance coverage for vicarious liability for punitive damages than for direct liability." *Id.*, 422 N.Y.S.2d at 50 (footnote omitted).

punitive damages. However, neither state's public policy prevents insurance coverage for vicarious liability for punitive damages. Therefore the motions of those defendants whose policies are governed by New York law are granted to the limited extent that punitive damages are assessed against plaintiffs for direct—and not vicarious—liability. This ground further supports the court's granting of partial summary judgment to those defendants whose policies are governed by Missouri law, with respect to direct—and not vicarious—liability.

12. *CLEANUP COSTS*

Nearly all of the defendants in this action have filed motions for partial summary judgment declaring that their policies do not provide coverage for governmental cleanup or response costs or injunctive relief.[211] By these motions, defendants seek to avoid such liability, as alleged in the underlying suits of the United States and the State of Missouri against plaintiffs.[212] Three motions have been filed by certain defendants to renew summary judgment motions previously made.[213] Plaintiffs, and the

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[211] Unigard, American Employers, Employers Commercial Union, London Market defendants, Travelers, INA, Hartford, First State, CNA, American Re-Insurance, North Star, Aetna, U.S. Fire, Stonewall, ISOP, Lexington, American Home, Harbor.

[212] *United States v. Bliss*, No. 84-0200-C(1) (E.D. Mo.); *Missouri v. Bliss*, No. 84-1447-C(4) (E.D. Mo.); *Missouri v. Indep. Petrochemical Corp.*, No. 83-2670-C(C) (E.D. Mo.); *Missouri v. Syntex U.S.A., Inc.*, No. 85-2856-C-6 (E.D. Mo.).

The Missouri suits seek not only statutorily mandated clean-up and response costs but common law compensatory damages for harm to natural resources as well. Defendants' motions for partial summary judgment here are not directed to the issue of coverage for these legal damages. The United States' case does not allege such compensatory damages, however, and defendants seek to be relieved entirely of its duty to defend as well as indemnify plaintiffs with regard to this claim.

[213] Continental Ins. has moved to renew its July 3, 1986 motion seeking a declaration that it has no duty to defend or indemnify

State of Missouri as *amicus curiae*, oppose these motions, maintaining that the policies provide this coverage.

Plaintiffs argue that the court has already decided this issue in favor of coverage, citing *IPC v. Aetna*, 654 F. Supp. at 1359, and that this determination constitutes the law of the case. The preliminary determination that plaintiffs rely on presents no bar to the court's consideration of this issue here, in light of the recent decision of the Eighth Circuit sitting *en banc*. *See Kaplan v. Pointer*, 501 A.2d 1269, 1270 (D.C. 1985) (application of the law of the case doctrine requires that first court's ruling be sufficiently final, and that prior ruling not be clearly erroneous in light of change in substantive law).

I. *Choice of Law*

The court has noted above that issues turning on the interpretation of the policies at issue here would generally be governed by Missouri law. *See supra* section 1 (Waiver of Defenses) Part II (Choice of Law Principles). The court notes that cleanup and response costs, as well as the injunctive relief at issue here arose in Missouri from the actions of parties—including IPC,

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plaintiff TCC with regard to *United States v. Bliss*. Travelers seeks a similar declaration regarding all plaintiffs, renewing its May 2, 1986 motion. London Market defendants request a renewal of their motion, filed June 12, 1987, which is already under consideration by the court.

The motions of Continental Ins. and Travelers are properly brought pursuant to the court's order of February 5, 1987 and the recent decision of the Eighth Circuit *en banc* in *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988) (en banc) (*NEPACCO*), *reh'g denied*, (8th Cir. May 4, 1988). The court's February 5, 1987 decision denied these defendants' motions but noted that "In the event that the Eighth Circuit affirms the United States District Court's decision in [*NEPACCO*], defendants are free to renew their motions for partial summary judgment as to the [*U.S. v. Bliss*] case at that time." Memorandum of February 5, 1987 at 16.

which is the insured risk—that were located in Missouri. Except where a policy designates some other law as controlling, then, the court will resolve this question according to Missouri law.

A number of policies designate New York law as controlling. As the discussion below will show that New York law on this issue presents no fundamental conflict with the law of Missouri, the court will interpret these policies according to New York law.

II. *Missouri Law*

Since the filing of most of defendants' and plaintiffs' pleadings on this issue, the United States Court of Appeals for the Eighth Circuit has issued an *en banc* decision, reconsidering its prior panel decision, which directly addresses this issue. In *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir. 1988) (*en banc*) (*"NEPACCO"*), *reh'g denied*, (8th Cir. May 4, 1988), the Eighth Circuit holds that the CGL policy's coverage for "damages" is limited to legal damages and does not include such equitable damages as governmental clean-up costs. *Id.* at 985-87.

In *NEPACCO*, the court construed policy language substantially similar to that contained in the policies at issue here.[214] As the "home circuit" for Missouri, the Eighth Circuit is entitled to substantial deference in its interpretation of Missouri law. *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 121, 125 (D.C. Cir. 1986). As our own circuit court has stated, "unless we are convinced that the court has ignored clear signals emanating from the state courts," this court must defer to the reasoned analysis of the Eighth Circuit with regard to Missouri law. *Id.* at 125-26.

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[214] *Compare NEPACCO*, 842 F.2d at 979 (quoting representative "all sums" policy language) *with* section 11 *supra* (Punitive Damages, part V) (quoting representative policy provisions and concluding that all are comparable to "all sums" formulation).

The principal argument offered by the plaintiffs and *amicus curiae* is that the term "damages" is ambiguous and so under clearly established Missouri law must be construed to provide coverage. The *en banc NEPACCO* decision, however, explicitly found that "in the insurance context, . . . the term 'damages' is not ambiguous . . . ." 842 F.2d at 985. Although this conclusion is at odds with the decisions of certain other state and federal courts (and is supported by others), there are no Missouri state cases interpreting similar language. Since the court found no ambiguity in this language, furthermore, there is no need to look to the extrinsic evidence offered by the parties here.[215] The court finds no basis to conclude that the *en banc* Eighth Circuit has ignored clear signals from the courts of Missouri, and accordingly, will follow the *NEPACCO* precedent here with respect to those policies not containing a choice-of-law provision directing the application of the law of some other state. Policies containing such a provision are discussed below.

The court therefore will grant the partial summary judgment motions with respect to those policies governed by Missouri law, declaring that those policies provide no coverage for governmental clean-up or response costs or injunctive relief.

III. *New York Law*

Those policies that incorporate a choice-of-law provision designating New York law[216] are not bound by the *NEPACCO* decision, of course, but are governed by the

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[215] *See Robin v. Blue Cross Hospital Serv.*, 637 S.W.2d 695, 698 (Mo. 1982) (*en banc*) (unambiguous policy language must be enforced as written); *Claussen v. Aetna Casualty & Surety Co.*, 676 F.Supp. 1571, 1573 (S.D. Ga. 1987) (under Georgia law, court not to look beyond policy language when clear and unambiguous).

[216] These include the excess policies of INA, U.S. Fire, and certain later year policies of London Market defendants.

law of New York. Unlike Missouri, New York's state courts have twice considered whether the "all sums" type of insurance policy language includes coverage for governmental cleanup costs, finding coverage on both occasions. *See Kutcher's Country Club Corp. v. Lincoln Ins. Co.*, 119 Misc.2d 889, 465 N.Y.S.2d 136 (N.Y. Sup. Ct. 1987) (cost of cleaning up oil spill, required by New York statute, constitutes "property damage"); *Powers Chemco, Inc. v. Federal Ins. Co.*, No. 8462/85 (N.Y. Sup. Ct. Apr. 13, 1987) (cost of complying with cleanup order of New York state agency constitutes "damages").[217]

Applying the *Kutcher's Country Club* and *Powers Chemco* precedents to those policies governed by New York law, the court must deny these defendants' motions for partial summary judgment declaring that their policies provide no coverage for governmental cleanup and response costs and injunctive relief with regard to those policies.

IV. *Summary*

The motions of defendants for summary judgment declaring that their policies provide no coverage for governmental cleanup costs are granted with regard to those policies governed by Missouri law and denied with regard to those policies governed by New York law.

An appropriate Order accompanies this Memorandum Opinion.

/s/ Thomas A. Flannery
United States District judge

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[217] *But cf. Gulf & Western Industries, Inc. v. Seaboard Surety Co.*, 100 A.D.2d 820, 474 N.Y.S.2d 754 (N.Y. App. Div. 1984) (incidental expenses incurred in complying with consent judgment in trademark infringement and unfair competition case not covered by "all sums" type policy language because not within the purview of money damages," citing *Aetna Casualty & Surety Co. v. Hanna*, 224 F.2d 499 (5th Cir. 1955)).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3347

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Plaintiffs,

v.

AETNA CASUALTY AND SURETY COMPANY, *et al.*,
Defendants.

ORDER

[Filed Sept. 7, 1988]

Both defendants and plaintiffs have filed motions for summary judgment and partial summary judgment in this action, to determine defendant insurers' defense and indemnification obligations to plaintiffs Independent Petrochemical Corporation, Charter Oil Company and The Charter Company. Upon consideration of the parties' motions, oppositions and replies, and for the reasons set forth in the accompanying Memorandum Opinion, it is by the court this 7th day of September, 1988

ORDERED that the plaintiffs' motion for partial summary judgment declaring that INA has waived its nondisclosure defense with respect to its primary policies is granted. The remaining waiver motions are denied; and it is further

ORDERED that the motions of INA and U.S. Fire for summary judgment on grounds of nondisclosure are denied; and it is further

ORDERED that defendants' motions for summary judgment on the ground that plaintiffs failed to provide timely notice of occurrence are denied; and it is further

ORDERED that defendants' motions for partial summary judgment on the ground that The Charter Company is not a named insured under their policies are denied; and it is further

ORDERED that the motions of defendants North Star and American Re-Insurance for partial summary judgment declaring that their single policies do not provide potential coverage in excess of $2 million and $2.5 million, under their respective "limits of liability" provisions, for a one-year period, are granted. The motion of defendant Unigard for partial summary judgment declaring that its single policy limits aggregate coverage for all claims to $25 million is denied; and it is further

ORDERED that the motions of Travelers, American Employers and American Re-Insurance for partial summary judgment declaring that their policies provide coverage, if any, for a single policy period, are denied; and it is further

ORDERED that the motion of defendant Travelers is granted with respect to claims that in their entirety seek bodily injury and property damage arising at the following sites: Minker/Stout, Times Beach, East North Street, Lacy Manor, Bull Moose Tube and Hamill Transfer. Travelers' motion is denied with respect to claims arising out of the Saddle and Spur Club site. The motions of the excess insurers for partial summary judgment with respect to the specified "Minker/Stout" and "Times Beach" cases are granted; and it is further

ORDERED that the defendants' motions seeking partial summary judgment on the grounds that all property

damage occurred at certain sites prior to the commencement of their policies are denied; and it is further

ORDERED that the defendants' motions for partial summary judgment on the grounds that coverage under their policies' is limited by a "completed operations" or "products liability" provision are denied; and it is further

ORDERED that Lexington's motion for summary judgment based on its pollution exclusion clause is granted. All other defendants' motions for summary judgment based on a pollution exclusion clause are denied; and it is further

ORDERED that the motions for partial summary judgment of defendants whose policies contain an express exclusion of punitive damages, either independent or within a pollution exclusion provision, are granted. The motions of those defendants whose remaining policies are governed by Missouri law are granted on the grounds that their general coverage language does not include punitive damages. The motions of those defendants whose remaining policies are governed by New York law are *not* granted on general coverage language grounds. The motions of those defendants whose policies are governed by New York law are granted to the limited extent that punitive damages are assessed against plaintiffs for direct—and not vicarious—liability; and it is further

ORDERED that the motions of defendants for partial summary judgment declaring that their policies provide no coverage for cleanup costs are granted with regard to those policies governed by Missouri law and denied with regard to thoses policies governed by New York law.

/s/ Thomas A. Flannery
United States District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-3347

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Plaintiffs,

v.

THE AETNA CASUALTY AND SURETY COMPANY, *et al.*,
Defendants.

ORDER FOR ENTRY OF FINAL JUDGMENT

[Filed Aug. 23, 1989]

This declaratory judgment action was filed on November 9, 1983. On May 21, 1984, plaintiffs filed a First Amended Complaint. Since that time, the parties have engaged in and completed extensive discovery, and have at various times filed numerous summary judgment motions in order to resolve or narrow the areas of disagreement between the parties. The Court has now ruled on all of these motions. The Court notes that it has also received from the parties proposed orders, responses to proposed orders, and replies to the responses with regard to the certification for appeal of various of this Court's orders and rulings. Based on the consideration of such motions, responses, and replies, the Court orders the following:

FINAL JUDGMENT UNDER RULE 54(b)

This action presents multiple claims as well as multiple parties and involves a large number of issues, competing interests and complex facts that arise out of the spread of dioxin in the early 1970s by one Russell Bliss. This court

has previously made rulings and judgments that determine some of the important coverage claims in this case. One of those judgments disposes of claims that form a significant part of the entire range of the actions and claims for which plaintiffs seek coverage from the defendants, and because of the importance that public policy increasingly places on resolving environmental disputes, this Court expressly finds that there is no just reason for delay, and consequently directs the Clerk to enter a final judgment on the First and Second Claims for Relief with respect to the parties described below, in accordance with Rule 54(b) of the Federal Rules of Civil Procedure, as to the following:

1. It is hereby, DECLARED that all defendants, except with respect to those policies that incorporate a choice-of-law provision designating New York law as the governing law, have no obligation to defend or indemnify plaintiffs for governmental clean-up or response costs or injunctive relief.

2. With respect to all claims made by plaintiffs against defendant Pacific Indemnity Company ("Pacific") in this action, all issues related to which claims have been determined by summary judgment pursuant to a Memorandum decision filed February 4, 1986, in accordance with Rule 54(b), Fed. R. Civ. P:

(a) the Court determines that there is no just reason for delay; and

(b) the Court hereby directs the entry of final judgment in favor of Pacific on all claims made by plaintiffs against Pacific in this action.

This Court shall retain jurisdiction with respect to all other matters not set forth above.

/s/ Thomas A. Flannery
United States District Court Judge

Dated: August 23, 1989

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 83-3347

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Plaintiffs,

v.

THE AETNA CASUALTY AND SURETY COMPANY, *et al.*,
Defendants.

JUDGMENT

[Filed Aug. 25, 1989]

Pursuant to the Order for Entry of Final Judgment filed on August 23, 1989 directing the Clerk to enter a final judgment on the First and Second Claims for Relief with respect to certain parties, it is adjudged as follows:

(1) It is hereby, DECLARED that all defendants, except with respect to those policies that incorporate a choice-of-law provision designating New York Law as the governing law, have no obligation to defend or indemnify plaintiffs for governmental clean-up or response costs or injunctive relief.

(2) With respect to all claims made by plaintiffs against defendant Pacific Indemnity Company ("Pacific") in this action, all issues related to which claims have been determined by summary judgment pursuant to a Memorandum decision filed February 4, 1986, in accordance with Rule 54(b), Fed. R. Civ. P:

(a) the Court determines that there is no just reason for delay; and

(b) the Court directs the entry of final judgment in favor of Pacific on all claims made by plaintiffs against Pacific in this action.

JAMES F. DAVEY
Clerk

By /s/ Maureen A. Lawrie
Deputy Clerk

Approved /s/ Thomas A. Flannery
THOMAS A. FLANNERY
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5368

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Appellants

v.

THE AETNA CASUALTY AND SURETY COMPANY, *et al.*

and Consolidated Case No. 89-5367

Before: Edwards, Williams and Randolph, Circuit Judges

ORDER

[Filed Nov. 5, 1991]

Upon consideration of appellees' petition for rehearing filed October 15, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5368

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Appellants

v.

THE AETNA CASUALTY AND SURETY COMPANY, *et al.*

and Consolidated Case No. 89-5367

Before: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

[Filed Nov. 5, 1991]

Appellees' Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Wald did not participate in this matter.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 9607. *Liability*

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

* * * *

(f) Actions involving natural resources; maintenance, scope, etc.

(1) Natural Resources liability

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, man-

aged by, controlled by, or appertaining to such State and to any Indian tribe for natural resources belonging to, managed by, controlled by, or appertaining to such tribe, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation: *Provided, however,* That no liability to the United States or State or Indian tribe shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license, so long as, in the case of damages to an Indian tribe occurring pursuant to a Federal permit or license, the issuance of that permit or license was not inconsistent with the fiduciary duty of the United States with respect to such Indian tribe. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee, without further appropriation, for use only to restore, replace, or acquire the equivalent of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State. The measure of damages in any action under subparagraph (C) of subsection (a) of this section shall not be limited by the sums which can be used to restore or replace such resources. There shall be no

double recovery under this chapter for natural resource damages, including the costs of damage assessment or restoration, rehabilitation, or acquisition for the same release and natural resource. There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

APPENDIX F

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

No. 864-00284

Division 3

COOPER INDUSTRIES, INC., MCGRAW-EDISON COMPANY, EDISON INTERNATIONAL, INC., STUDEBAKER-WORTHINGTON, INC., and WAGNER ELECTRIC CORPORATION,

Plaintiffs,

v.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CONTINENTAL INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, UNITED STATES FIRE INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, LLOYD'S OF LONDON, HARBOR INSURANCE COMPANY, LUMBERMEN'S MUTUAL CASUALTY COMPANY, AMERICAN RE-INSURANCE COMPANY, MUTUAL FIRE MARINE & INLAND INS. CO., NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY, SOUTHERN AMERICAN INSURANCE COMPANY, and AMERICAN EMPLOYERS INSURANCE COMPANY,

Defendants.

MEMORANDUM, ORDER AND PARTIAL JUDGMENT

[Filed Sept. 8, 1989]

Plaintiffs, large industrial corporations, seek declaratory relief concerning the liabilities of defendant insurance companies to provide coverage for costs and expenses in-

curred by plaintiffs, on account of hazardous waste found on property formerly owned by Wagner Electric Corporation in St. Louis County. Defendant insurers have moved for summary judgment. The motions have been argued and briefed at length.

This is another in a series of actions between industrial corporations and insurance companies seeking to utilize the courts as a mechanism to rewrite contracts and "spread the risk" of liability for environmental contamination. See *The Wall Street Journal*, Aug. 1, 1989, p. B1. The Court cannot let pass this opportunity to animadvert on Professor Horwitz's "loss spreading" notions, which are merely "critical legal studies" code words to disguise methods by which courts can be utilized as devices for imposing socialist or Marxist economics through perversion of the common law. There can be little doubt that theoreticians such as Professor Horwitz, with whose views of American legal history the Court itself is directly acquainted, have succeeded in mesmerizing a generation of lawyers with what Professor Huber has aptly characterized as a system of "contorts." See P. Huber, *Liability: The Legal Revolution and Its Consequences* 34 (1988). The word, attributed by Professor Huber to Grant Gilmore, is a pun, for Professor Horwitz and his colleagues (such as Professor Duncan Kennedy) have indeed succeeded in contorting American jurisprudence insofar as the law of contract is concerned.

In examining the record in this case, and reviewing the law, this Court has been at pains to adhere to the principle that parties to a contract are entitled to the benefit of their bargain, and courts do not sit to rewrite the contracts of parties to achieve results thought to be socially desirable, whether or not such results accord with what Professor Horwitz and his ilk would regard as sound "loss spreading." If, indeed, "everyone shared the benefits of industrialization and everyone must now share in its costs," *The Wall Street Journal*, *supra*, at col. 5, that is

to be accomplished by legislation and taxation, matters entrusted to the legislative branch of government.

Having unburdened itself on one subject of perhaps marginal significance to the parties here, the Court must also express its regret at the delay in disposing of the instant motions, which were argued in December, 1988, and submitted in January, 1989. The briefs of counsel are exceptionally lucid and have been of great assistance to the Court, and the Court wishes to commend all counsel, and especially plaintiffs' counsel, for the quality of their work. However, the Court's obligation on these motions for summary judgment was to act if the pleadings, depositions, answers to interrogatories, admissions and exhibits on file revealed no genuine issue of material fact, permitting entry of judgment as a matter of law. Rule 74.04, Mo.R.Civ.P. This standard, in the Court's view, demanded a careful examination of the whole record. In the course of that chore, it soon became apparent that this case could be considered, alas, another illustration of the sort of chancery practice scathingly satirized in Dickens' *Bleak House*, in which the "flower of the bar" (leaving aside whether there are "mature autumnal fruits of the woolsack" involved) have energetically demonstrated that waves of pleadings and discovery can repeatedly dash themselves against the rocks of determined evasion and objection, without accomplishing much of anything except the enrichment of counsel and excoriation by the public. The amount of useful information obtainable from the interrogatories filed in this case probably can be summarized upon a half-dozen sheets of notepaper; yet the Court has felt bound to sift painstakingly through this enormous record to forestall the possibility that some genuine issue of material fact, lurking in the verdure of objections and uninformative answers to interrogatories, will leap out on appeal at some time, and condemn the parties, counsel, and the trial court to begin the whole process anew some years hence. Thus, while the Court

regrets the inordinate time it has taken to resolve the pending motions, the Court is hard put to see how it could have acted more swiftly, unless it chose not to read what the parties' counsel filed!

Parties and Procedural History

The plaintiffs, as noted above, are several corporations. The corporate relationships of the plaintiffs would read like a genealogy from the Bible, so the Court will omit detailed description. Suffice it to say that plaintiffs are a parent (Cooper Industries) and several wholly-owned subsidiary corporations, one of which, Wagner Electric Corporation, owned and operated a factory in St. Louis County for many years. See Amended Petition, ¶¶ 2a-f; see also affidavit of Anthony Black, exhibit 2 to memo. in opposition to summary judgment, ¶ 2. Defendants are twelve insurance companies which issued policies of primary or excess (or "umbrella") general liability insurance to the plaintiffs. One of the original named defendants, American Mutual, settled the case and the plaintiffs' claims as to American Mutual were voluntarily dismissed in December, 1986. Most of the defendants issued policies to plaintiff Studebaker-Worthington, which has since dissolved. See petition amendment filed 7/2/87. All of the policies issued by defendants, however, named plaintiff Wagner Electric as a named insured. See appendix of policies filed in support of defendants' motion for summary judgment (hereinafter referred to as "Policy App."); separate filings of Lumbermens, National Union, Harbor Mutual and Insurance Company of North America policies.

None of the plaintiffs is incorporated in Missouri, but, until 1967, Wagner Electric's principal place of business was in St. Louis County. Black affidavit, ¶ 3. None of the defendants is incorporated in Missouri or has its principal place of business in Missouri; but all defendants are licensed to do business in Missouri. See Amended Peti-

tion, ¶¶ 3-15, and corresponding admissions in answers filed by respective defendants.[1] Only one of the policies in issue in this case was issued or delivered in Missouri, namely the excess policy of American Employers for the period 1965-68. Black affidavit, ¶ 14. The insured plaintiffs all operated on a nationwide basis, and the policies of insurance all insured risks in many different states. *Id.* During the pendency of this litigation, one of the defendant insurers, Mutual Fire, has become insolvent. See memorandum filed 5/15/89.

This action was commenced in June, 1986, with the filing of the plaintiffs' original petition, in two counts, seeking a declaration of the defendants' duties and liabilities to provide insurance coverage under their policies, and to recover damages for breach of contract (count II). On August 16, 1986, defendant Harbor Insurance filed its answer and a counterclaim, likewise seeking a declaration of rights and liabilities under its policy, affirmatively asserting that it had no liability to plaintiffs under the facts alleged.

The answers of the defendants, filed over a period of a year, raise a variety of affirmative defenses. First State's counsel divined the existence of 21 affirmative defenses, including, Answer at ¶ 54, that the claims against plaintiffs for which coverage was sought were not "legal damages." The question of whether the cleanup costs described in plaintiffs' amended petition were covered "damages" under the policy was also specifically pleaded by Continental, Answer, ¶ 9, American Re-Insurance, Answer, ¶ 8; London Insurance 1971, Answer; filed 2/3/87; and National Union, Amended Answer filed 8/26/87. Not all of the defendants, however, pleaded the "dam-

[1] One of the defendants named in the amended petition, Lloyd's, is not a party at this point. By stipulation, a group of foreign insurance companies has submitted to the jurisdiction of the Court under the name "London Insurance 1971" and this consortium is substituted for Lloyd's. Stipulation filed 12/9/86.

ages" issue as an affirmative defense. Defendants' answers also raised issue of ripeness, at least insofar as "excess" insurance policies were concerned, and the capacity of Studemaker, a dissolved corporation, to sue under § 351.565, R.S.Mo. 1986. See, e.g., Answer of London Insurance 1971, filed 2/3/87; Northbrook amended answer, filed 8/4/87. There was also the suggestion that necessary parties, i.e., other insurance companies, have not been joined herein. See motions to dismiss, filed 6/11/87, by American Employer's and Continental.

Despite the efforts of Judge Mummert, to whom this case was assigned in 1987, to place it on track for trial, discovery and other pretrial proceedings were protracted. See orders of 5/19/87, 6/4/87, 11/24/87 and 12/7/87. The first series of interrogatories served by plaintiffs were met by almost uniform objections by defendants, although requested documents appear to have been produced with greater cooperation. Only after Judge Mummert disposed of various motions to dismiss and for summary judgment, and manifold objections to discovery in June, 1987, was any truly useful information provided through answers to interrogatories. Interrogatory answers from all parties dribbled in throughout 1987 (after another order on objections in December, 1987) and 1988, and document requests were filed and responded to.

Eventually, defendant Lumbermens moved for summary judgment in September, 1988. Thereafter, the other eleven codefendants filed a joint motion for summary judgment, adopting Lumbermens' legal theories. Plaintiffs filed an extensive memorandum in opposition, including various affidavits and extraneous materials in the nature of minutes of proceedings of what may perhaps best be described as the insurance industry's boilerplate factory, now known as the "ISO," and various documents presented to Congress by insurance industry lobbyists regarding the liability provisions of the "Superfund

Law," or CERCLA, 42 U.S.C. § 9601 et seq. The Chemical Manufacturers' Association and several large chemical firms, or hazardous waste-generating firms, based in St. Louis (Monsanto, et al.) were granted leave to file a brief as amici curiae in support of plaintiffs. As oral argument, the Insurance Environmental Litigation Association (IELA) was granted leave to file a brief as amicus curiae in support of defendants. All parties filed a plethora of slip opinions from trial and appellate courts around the nation in support of their respective views.

The motions for summary judgment were argued on December 16, 1988. At oral argument, the parties agreed that no claim for fraud would be covered under any of the policies at issue in this case. See Tr. oral arg. at 46-47. Plaintiffs also conceded that Missouri law governed one of the policies at issue, that of American Re-Insurance. *Id.* at 53.

At oral argument, and in their replies to plaintiffs' brief in opposition to summary judgment, the defendants objected to the proffer of the affidavits of plaintiffs' experts, setting forth their opinions as to the meaning of the term "damages" in insurance industry usage, and to the minutes of proceedings of the "General Liability Governing Committee" concerning drafting of pollution liability exclusions in standard insurance contracts. See Lumbermens separate reply brief.

Facts

From 1906 until 1982, plaintiff Wagner Electric owned and operated a factory on Plymouth Avenue in St. Louis County. During at least the later period of the factory's operations, its principal business was the manufacture of electrical transformers. In that process, during the period 1964-68, Wagner utilized certain special transformer oils, including a Monsanto Company product called "Noflamol," which were placed in the transform-

ers as insulation. The manufacturing process required that quantities of these oils be delivered to, stored on, and piped through Wagner's factory. These oils contained PCB's (polychlorinated biphenyls), a very toxic chemical; the manufacturing process also generated poisonous matter, such as soluble cyanides. Amended petition, ¶ 18; EPA order of 3/27/85, exhibit B to amended petition; plaintiffs' answers to Continental interrog. nos. 7-8; plaintiffs reply to Harbor counterclaim, ¶ 4. In the course of Wagner's operations, and no one can say with certainty precisely when, these PCBs and other poisons came to be deposited in and on the soil and structures at Wagner's factory. Manufacture of transformers ceased in 1968. Plaintiffs' answers to Continental interrog. nos. 7-8. It is not clear from the record what, if any, other operations continued at the Wagner factory after that time.

In 1982, Wagner donated its Plymouth Avenue facility to the Land Clearance for Redevelopment Authority of St. Louis County (LCRA). Amended petition, ¶ 19. LCRA took possession of the whole by July, 1983, for the purpose of redeveloping the site for other viable industrial or commercial uses. At some later time, LCRA and certain private citizens discovered the presence of PCB's. The Environmental Protection Agency was alerted, and commenced an inspection, which led to the institution of administrative proceedings against Wagner, McGraw-Edison, Edison International (plaintiffs here) and LCRA. An administrative order was entered on March 27, 1985, pursuant to 42 U.S.C. § 9606(a), which found that environmental contamination existed. The "generators" of the hazardous substances on the property, Wagner, McGraw and Edison, were ordered to clean up the site at their expense. EPA order, ex. B to amended petition.

In May, 1985, LCRA commenced an action in the United States District Court for the Eastern District of Missouri against the plaintiffs in this case, seeking in

count I recovery under 42 U.S.C. § 9607 of costs incurred by LCRA in cleaning up the site, alleged to be $605,000, and in count II recovery of actual and punitive damages for fraud. This action was settled by LCRA and Cooper by an agreement which was filed in this action under seal.[2] The agreement required Cooper to pay $2,000,000 to LCRA and to clean up the Wagner site, pursuant to an EPA-approved plan, at Cooper's expense. The settlement agreement does not differentiate between the two counts of LCRA's complaint, but contains mutual releases of all claims, and requires LCRA to hold Cooper harmless for any claims arising post-1982.

The contamination at the Wagner site has been cleaned up at this time. See O'Brien affidavit, ex. 1 to plaintiffs' brief in opposition to summary judgment. As of December, 1987, Cooper had expended at least $460,000 in direct cleanup costs, with an apparent total obligation of over $1,300,000 to comply with the EPA order; had paid $100,000 to an adjacent landowner for alleged environmental contamination; and had incurred some $217,000 in legal expenses. See plaintiffs' answers to American Employer interrog. no. 16, filed 12/7/87; plaintiffs' answers to Continental interrog. no. 75.

Plaintiffs have limited the relief sought to insurance policies issued during the period 1965-1982. A detailed chart of the insurance policies, whether primary or excess, and the periods of coverage, has been filed by plaintiffs and does not appear to be disputed. The chart is attached hereto as an appendix. Suffice it to say that during 1965-82, plaintiffs, specifically Studebaker-Worthington (which dissolved upon merger into Edison International, see Amended Petition, ¶ 2a-f; Black affidavit,

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[2] The Court concludes that its needs in writing this opinion, as well as the public interest in disclosure of judicial proceedings, warrant disclosure of the material provisions of the settlement, notwithstanding that the document itself remains under seal.

ex. 2 to plaintiffs' brief in opposition to summary judgment, ¶ 2), and McGraw-Edison, obtained policies of primary insurance from Continental, Insurance Company of North America (INA), National Union and American Mutual. Black affidavit, ¶¶ 4-14. Excess or umbrella policies for that period were obtained from Continental, American Employers, Harbor, London Insurance 1971, Lumbermens, Mutual Fire, Northbrook, Southern, First State, American Re-Insurance, U.S. Fire and National Union. *Id.*; see also Amended petition ¶¶ 3-15 and corresponding admissions in defendants' answers. A number of the excess policies were "following form" policies, and it is not disputed that these policies effectively incorporate by reference the terms and conditions of the underlying or primary policies in force during congruent time periods. The primary policies issued by INA were "fronted" coverage policies only, i.e., the stated policy limits were identical to the deductible. Plaintiffs' answer to American Re-Insurance interrog. 74. All of the policies were obtained by plaintiffs from insurance brokers, some in California, some in New York, some in New Jersey, one in St. Louis. The premiums were paid through these brokers. The policies were issued at the headquarters of the insurers, frequently countersigned by agents at different locations, and delivered to plaintiffs in New York or New Jersey, with the exception of the American Employers policy, which was issued and delivered in St. Louis. Black affidavit, ¶ 4.

Critical to the determination of this case is the language of each policy at issue. Thus, tedious as it is, the Court is constrained to set out the language of the respective policies at some length. All of the relevant policies, except for policies issued by INA (which are relevant because of some of the defendants' "following form" policies) Lumbermen, and the Harbor policy, have been filed as part of the appendix described above. The INA, Lumbermen and Harbor policies were filed separately.

The Continental policy issued for 1968 provides in pertinent part as follows:

> COVERAGE B—PROPERTY DAMAGE LIABILITY
>
> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> A. bodily injury or
>
> B. property damage
>
> to which this insurance applies, caused by an occurrence . . .

The terms and provisions quoted above from the 1968 Continental policy are also contained in all the other policies issued to plaintiffs, with the exception of a Continental excess policy issued for 1968, Policy app. ex. 28, but the Court infers that the absence of that language from ex. 28 is the result of inadvertence on the part of the compliers of the appendix, since Continental's policies are otherwise uniform.

The Harbor insurance policy for the period January 1, 1971 to May 1, 1973, issued to Studebaker-Worthington, Inc., and others (see Harbor Ctrclm., ¶ 36; Amended petition, ¶ 9) provides as follows:

> INSURING AGREEMENT
>
> 1. COVERAGE
>
> [The Company] hereby agree[s], subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability . . . imposed upon the Assured by law . . . for damages on account of

(i) Personal Injuries;

(ii) Property Damage;

(iii) Advertising Liability;

caused by or arising out of each occurrence . . .

The terms and limitations in the Harbor policy set forth above are incorporated by reference in the London Insurance 1971 policies issued to Studebaker-Worthington, Inc. and others. The London policies thereunder include the following:

> Underwriters hereby agree . . . to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of liability * * * for damages * * *

American Employer's policy, effective January 1, 1965 to January 1, 1968, issued to Wagner Electric Corporation, provides in pertinent part as follows:

> I. COVERAGES: To indemnify the insured for all sums which the insured shall be obligated to pay by reason of the liability imposed upon him by law or liability assumed by him under contract or agreement for damages, and expenses, all as included in the definition of "ultimate net loss," because of:
>
> (a) personal injuries, as hereinafter defined;
>
> (b) property damage, as hereinafter defined;
>
> (c) advertising liability, as hereinafter defined.
>
> * * *
>
> 5. Ultimate Net Loss
>
> The term "ultimate net loss" shall mean the total sum which the insured, or any company as his insurer, or both, becomes legally obligated to pay as damages because of personal injury, property damage, or advertising liability claims, either through adjudication or compromise, and shall

also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest on judgments, expenses for doctors, lawyers, nurses, and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the named insured's or of any underlying insurer's permanent employees.

The American Re-Insurance policy, effective January 1, 1974 to January 1, 1975, provides in pertinent part:

INSURING AGREEMENT

1. The Company hereby indemnifies the Insured against ultimate net loss in excess of and arising out of the hazards covered and as defined and in excess of the underlying insurance as shown in Item 4 of the Declarations (hereinafter referred to as "underlying insurance") but only up to an amount not exceeding the limit(s) shown in Item 5 of the Declarations.

2. Except as may be inconsistent with this Certificate, the coverage provided by this Certificate shall follow the insuring agreements, conditions and exclusions of the underlying insurance (whether primary or excess) immediately preceding the layer of coverage provided by this Certificate, including any change by endorsements . . .

ULTIMATE NET LOSS AND COSTS

13. Ultimate net loss, as used herein, shall be understood to mean the sums paid in settlement of losses for which the insured is liable after making deductions for all recoveries, salvages and other insurances (other than recoveries under the underly-

> ing insurance, policies of co-insurance, or policies specifically in excess hereof), whether recoverable or not, and shall exclude all "Costs."

The policies of Insurance Company of North America (hereinafter "INA") issued to plaintiffs in this case all contain the following language, in effect incorporated by reference into the policies of American Re-Insurance and Mutual Fire:

> COVERAGE—PROPERTY DAMAGE LIABILITY
>
> The Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of
>
> A. Bodily injury or
>
> B. property damage
>
> to which this insurance applies, caused by an ocrence . . . .

The American Re-Insurance policies define "ultimate net loss" in terms of "sums paid in settlement of losses," and do not use the term damages; nevertheless, such policies also contain the following:

> Except as may be inconsistent with this Certificate, the coverage provided by this Certificate shall follow the insuring agreements, conditions and exclusions of the underlying insurance . . . .

The Mutual Fire policies promise to "indemnify the Insured for the amount of excess net loss which is in excess of the underlying limits" of primary coverage, and expressly define "excess net loss" to mean "all sums which the Insured shall become legally obligated to pay as damages . . . ."

The Northbrook excess policies provide in pertinent part as follows:

I. COVERAGE

The Company hereby agrees, subject to the limitations, terms, and conditions hereinafter mentioned, to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability.

A. imposed upon the Insured by law, or

B. assumed under contract or agreement by the Named Insured, for damages on acount of

A. Personal Injuries

B. Property Damage

C. Advertising Liability,

caused by or arising out of each Occurrence happending anywhere in the world.

The terms and provisions of the Northbrook policies quoted above are identical to those contained in the policy of National Union (filed separately from the appendix, 1/3/89).

Southern American's policy provides in pertinent part:

INSURING AGREEMENT

1. The Company hereby indemnifies the Insured against ultimate net loss in excess of and arising out of the hazards covered and as defined and in excess of the underlying insurance as shown in Item 4 of the Declarations (hereinafter referred to as "underlying insurance") . . . .

2. Except as may be inconsistent with this Certificate, the coverage provided by this Certificate shall follow the insuring agreements, conditions and exclusions of underlying insurance (whether primary or excess) immediately preceding the layer of coverage provided by this Certificate, including any change by endorsement.

ULTIMATE NET LOSS AND COSTS

13. Ultimate net loss, as used herein, shall be understood to mean the sums paid in settlement of losses for which the Insured is liable after making deductions for all recoveries, salvages and other insurances (other than recoveries under the underlying insurance, policies of co-insurance or policies specifically in excess hereof), whether recoverable or not, and shall exclude all "costs."

U.S. Fire's policies provide in pertinent part as follows:

I. COVERAGE

The Company agrees to pay on behalf of the insured the ultimate net loss in excess of the retained limit hereinafter stated, which the insured may sustain by reason of the liability imposed upon the insured by law, arising out of an occurrence or assumed by the insured under contract, for:

(a) Personal Injury Liability,

(b) Property Damage Liability, or

(c) Advertising Liability.

In any jurisdiction where, by reason of law or statute, this policy is invalid as a "pay on behalf of" contract, the Company agrees to indemnify the insured for ultimate net loss in excess of the retained limit.

5. "ULTIMATE NET LOSS"

"Ultimate net loss" means the total of the following sums with respect to each occurrence:

1. All sums which the insured, or any company as his insurer, or both, is legally obligated to pay as damages, whether by reason of adjudication or settlement, because of personal injury, property damage or advertising liability to which this policy applies . . .

First State's policies (almost illegible copies of which are in the Policy App.) provide in pertinent part as follows:

> Coverage: To indemnify the Insured for such loss as would have been payable under all of the terms of the Liability Coverages afforded by the underlying policies listed in Item 5 of the Declarations if the limits of liability stated in Item 4 of the Declarations were available under the underlying policies in addition to the limits of liability stated in Item 5 of the Declarations (hereinafter called the "underlying limits"); provided the Company's obligation hereunder shall apply only to loss in excess of such underlying limits.
>
> * * *
>
> 6. Application of Underlying Policies: This policy, except where provisions to the contrary appear herein, is subject to all the conditions, agreements, exclusions and limitations of and shall follow the underlying policies in all respects, including changes by endorsement.

ENDORSEMENT #2

PARTICIPATING POLICY—CLARIFYING ENDORSEMENT

In consideration of the premium charged, it is agreed that Item 5, of the Declarations, Underlying Policy and Limits, is amended to read:

Item 5. Participating Policy and Limits

It is further agreed that Item 1 of the Insuring Agreements is deleted and replaced as follows:

> Coverage: To indemnify the Insured for such loss as would have been payable under all of the terms of the Liability Coverages afforded by the participating policy listed in Item 5 of the Dec-

larations; provided the Company's obligation hereunder shall apply only to loss in excess of underlying insurance or a self-insured retention as scheduled in the participating policy.

9. Definitions:

a. Loss: The word "loss" means the sum paid in settlement of losses for which the Insured is liable after making deductions for all recoveries, salvages, and other insurance (other than recoveries under the policy of the underlying insurance), whether recoverable or not, and shall exclude all expenses and "costs."

Lumbermens policy (filed separately 11/2/88, see affidavit of John Wildey) provides in pertinent part:

I. Coverage

The Company agrees to indemnify the insured for all sums which the insured shall become obligated to pay as damages, direct or consequential, and expenses, all as hereinafter defined as included within the term ultimate net loss * * *

"Ultimate net loss" means the total of the following sums arising out of any one occurrence to which this policy applies:

(a) all sums which the insured . . . shall become legally obligated to pay as damages . . .

Finally, the National Union policy provides in pertinent part as follows:

I. Coverage

The Company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability. [sic]

A. imposed upon the Insured by law, or

B. assumed under contract or agreement by the Named Insured, for damages on account * * *

The Court can find no language in any of the policies which implies a duty to defend the insured which is significantly broader than the coverages provided, or which modifies or redefines the language quoted from the various policies. The policy limits of the various policies provide coverage ranging from $100,000/$200,000 (Continental primary policies) to $20,000,000 (Northbrook excess policies). The limits of liability of several of the Continental primary policies have in fact already been exhausted. See Continental answers to plaintiffs' interrogatories, filed 8/1/87. On the record to date, the sums expended by plaintiffs by reason of the actions of the EPA and LCRA appear to exceed the limits of each of the potentially applicable primary policies.

Plaintiffs, via Cooper's insurance claims administrator sent identical claim letters to all of the defendant insurers in December, 1985. See filings of Mutual Fire, 7/16/87. During the next year or more, the insurers responded with "reservation of rights letters" or with outright denials of coverage. See exhibits to Black affidavit, ¶ 19. All of the insurers' responses contained general language disclaiming any intention to waive any defense not specified. However, only Lumbermens (in January, 1986) and Mutual Fire expressly raised the issue that the payments incurred by plaintiffs were not "damages." Ironically, Mutual Fire's letter of 3/26/87, at p. 2, declares that the LCRA complaint sought "actual damages."

Issues

Defendants' position, quite simply, is that under Missouri law the plain language of the insurance policies at issue here precludes plaintiffs' claims, for the policies promise only payment for damages, and plaintiffs' lia-

bilities for hazardous waste cleanup are not and cannot be considered damages. Plaintiffs, of course, disagree. Plaintiffs also contend that summary judgment is at present forbidden by factual disputes; that Missouri law governs only one of the policies at issue; and that defendants have waived or are estopped to assert their position that coverage does not exist as claimed by plaintiffs. The Court also notes that some of the pleadings of the defendants raise issues of ripeness and absence of indispensable parties, issues which must be examined because of their jurisdictional implications.

Jurisdictional Issues

Notwithstanding the literal terms of the declaratory judgment statute, § 527.020, R.S.Mo. 1986, the Court has no jurisdiction to address the claims of plaintiffs herein, unless a ripe and justiciable controversy is presented. Cf. *Missouri Dept. of Social Services v. Agi-Bloomfield Convalescent Center, Inc.*, 682 S.W.2d 166 (Mo.App. 1984) Most, if not all, of the defendants who issued "excess" liability policies have asserted that claims against them are not "ripe," unless and until exhaustion of underlying coverage is shown. The Court finds, as a matter of fact, however, that plaintiffs have made a sufficient showing of ripeness for the Court to proceed. At least some, if not all, of the primary policies are or would be exhausted if coverage were to be found for the liabilities of plaintiffs to clean up the Wagner Electric site. Moreover, the rights and liabilities of all of the parties are closely interrelated in this instance. A declaration that one or more of the defendants is not liable to plaintiffs will directly affect the amount of the fund that plaintiffs could look to for indemnity, as well as the amount of liability of each and every defendant. Under such circumstances, all of the parties herein have standing to seek a declaration of their rights and liabilities under the contracts here at issue. See § 527.100; *Protective Cas. Ins. Co. v. Cook*, 734 S.W.2d 898 (Mo.App. 1987).

Under Rule 52.04, Mo.R.Civ.P., necessary parties must be joined if possible. Some necessary parties are "indispensable," i.e., the action cannot proceed in their absence, except in limited circumstances. Failure to join these indispensable parties deprives the court of jurisdiction. See, e.g., *Vanderson v. Vanderson*, 668 S.W.2d 167 (Mo. App. 1984). Here, Insurance Company of North America has not been joined, and some of the parties contend that Northumberland Insurance and INSCO, and possibly other excess insurers exist and have not been joined. Nevertheless, the Court perceives no jurisdictional bar to proceeding. Each insurer's liability in a given case must be measured by the terms of that insurer's policy. Although a decision construing "standard" policy language may have implications for all insurers using such language, this does not damage the ability of such insurers to protect their interests in separate litigation. If that were so, every insurance contract case would require the joinder of all insurers with the same or similar policies. That cannot be. Furthermore, at least one of the absent insurers, INA, has no interest in this litigation for the simple reason that its policies provided "fronted" coverage only, and it could suffer no prejudice even if the terms of its policy, incorporated by reference in some of the excess policies, were found to provide coverage to plaintiffs. Although the appended insurance chart identifies some other absent insurers, the Court is confident that there are no "indispensable parties" in this case.

The issue of plaintiff Studebaker's capacity to bring this action in light of § 353.565, R.S.Mo 1986, need not be decided at this juncture. Studebaker's capacity to sue is immaterial, for Wagner Electric, a named insured, still exists and is a party.

Choice of Law

Plaintiffs contend that the Court must look to New York, New Jersey, Illinois, and Missouri law in construing the policies at issue. Why, then, did plaintiffs select

this forum in preference to that of New York or New Jersey, especially when the latter has resoundingly vindicated plaintiffs' position? Perhaps that question is irrelevant; the Court should not be ungrateful for the opportunity to add its mite to the impressive body of jurisprudence on the subject of this case.

What is relevant is that Missouri has adopted the principles of the Restatement (Second) Conflict of Laws, §§ 6, 188 & 193. *Protective Cas. Ins. Co. v. Cook, supra*; *Crown Center Redevelopment Corp. v. Occidental Fire & Cas. Co.*, 716 S.W.2d 348, 358 (Mo.App. 1987). The insurance policies at issue here are "casualty" policies, insuring plaintiffs against liability arising out of stated risks. The question, then, is whether Missouri or some other state has the "most significant relationship" with the insurance contracts at issue. Of particular importance in making this determination is that Restatement, § 193, expressly declares that policies of casualty insurance are to be construed according to the law of the place of the insured risk.

In the instant case, all of the insurance contracts are products of interstate transactions not directly involving Missouri, with the single exception of the American Employers policies for the period 1965-68. All of the plaintiffs, now and in the past, operated on a national basis. Policies were seldom issued and delivered in the same state, and even when they were, it is clear that each policy contemplated coverage for numerous subsidiaries and named insureds in addition to the first named in the declarations. Wagner Electric, whose principal place of business was in St. Louis, Missouri, was a named insured in each and every policy. The claim which produced this litigation arose in Missouri. Its resolution may profoundly affect future toxic waste liability cases in Missouri. The victims of the environmental contamination giving rise to the litigation are all in Missouri. All of the insurers are qualified to do business in Missouri. Fi-

nally, to evaluate the defendants' policies by the laws of different jurisdictions would be wholly at variance with the considerations set forth in Restatement, § 6(2)(f) & (g), indicating that certainty, predictability and uniformity of result and ease of determining and applying the correct rule of law are important factors in any choice of law decision.

Although the commentary to Restatement, § 193 suggests that insurance contracts which contemplate insuring multiple risks in multiple jurisdictions are not governed by the law of the place of the risk (since there is no single risk location), this Court must accept the view of the Court of Appeals in *Crown Center*, supra, that a policy insuring multiple risks must be deemed a separate policy for each covered risk. Wagner Electric's Missouri operations were certainly contemplated by the parties to the contracts in this case, and the Court will apply Missouri law.

Propriety of Summary Judgment

Rule 74.04, Mo.R.Civ.P., governs summary judgments, and provides that the "judgment sought shall be entered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 74.04(c). The recent amendments to this rule make it clearer than ever that, even in Missouri, summary judgment is a "salutary" procedure, *Protective Cas. Ins. Co. v. Cook*, supra, 734 S.W.2d 905 (Simeone, Sr.J.), and is no longer a "disfavored procedural shortcut." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "Unassailable proof" is no longer required in Missouri. *Hayes v. Hatfield*, 758 S.W.2d 470 (Mo.App. 1988).

In the case at bar, the pending motions depend solely on the meaning of insurance contracts. The existence and

terms (i.e., text) of these contracts are not disputed. There is nothing in the record to raise a triable issue of fact concerning a course of dealing between plaintiffs and defendants which reasonably could be considered to constitute a "practical construction" of the policies at variance with their terms as written. On this record, the only issue is the meaning of the words used in the policies. That meaning, and whether the terms are ambiguous or not, falls within the area of questions of law. Differing opinions concerning the legal effect of documents are not factual issues precluding summary judgment. *Hayes v. Hatfield*, supra. Even the cases cited by plaintiffs under the pre-1988 summary judgment rule recognize that summary judgment may be proper when there is no dispute as to the terms of contracts appended to a motion. See *E. O. Dorsch Electric Co. v. Plaza Const. Co.*, 413 S.W.2d 167 (Mo. 1967).

In the absence of ambiguity discovered by the Court in its law-finding capacity, evidence extrinsic to the contract may not be used to construe it. E.g., *Schnuck Markets, Inc. v. Transamerica Ins. Co.*, 652 S.W.2d 206, 212 (Mo. App. 1983). Thus, the affidavits of plaintiffs' experts and their opinions of the word "damages" as used in insurance policies, the minutes of the insurance industry drafting committee, and the statements of insurance industry lobbyists to Congress cannot create a factual issue precluding summary judgment. The "facts" established by these affidavits are merely that there are differing opinions as to the meaning of the word "damages," that the insurance industry reacts quickly to threats of increased liability by searching for exclusionary language to incorporate into policies, that liability insurers in fact use standard-form policies to describe coverages, and that the insurance industry was eager to get Congress to limit its potential losses from new-found liabilities under environmental legislation. No one disputes these facts, but they must be deemed largely irrelevant here. Cf. *Buxton v.*

Harsh, 631 S.W.2d 95, 97-98 (Mo.App. 1982) (custom and usage relevant only where contract incomplete or uncertain).

As will become clearer in discussion *post*, the issues raised by the motions for summary judgment before the Court can be resolved without resolving disputed material facts, but as a matter of law. Summary judgment is appropriate on some of the claims raised by plaintiffs and a partial declaratory judgment can be entered. Cf. *Nicolai v. City of St. Louis*, 762 S.W.2d 423 (Mo. banc 1988) (summary judgment proper in declaratory judgment action).

Waiver or Estoppel

Plaintiffs contend that defendants have waived or are estopped to argue that environmental cleanup costs are not covered by the liability policies before the Court, since the defendants either failed to pinpoint this ground for denying coverage in their letters responding to plaintiffs' notices of claim, or failed to plead the theory as an affirmative defense. (Plaintiffs also contend that Rule 55.16 somehow bars defendants' assertion of the position that there is no coverage under their policies; this theory certainly need not be raised as a specific denial of a "condition precedent.") The facts of what the insurance companies did, and the texts of their letters and pleadings, are not, of course, in dispute. The only dispute is the legal effect of those actions or documents.

The Court rejects plaintiffs' contentions that defendants, in effect, created arguably nonexistent insurance coverage by failing to focus on the "damages" issue in their reservation of rights letters. The doctrines of waiver and estoppel cannot be utilized to create coverage which is not provided by the express terms of a policy, and probably [3] they cannot be used to authorize coverage

[3] The "probably" is caused by the decision in *State ex rel. Shelter Mut. Ins. Co. v. Crouch*, 714 S.W.2d 827 (Mo.App. 1986), a case inapplicable here.

specifically excluded. See, e.g., *Associated Indemnity Corp. v. Miller-Campbell Co.*, 596 S.W.2d 383, 389 (Mo. banc 1980); *Great West Cas. Co. v. Wenger*, 748 S.W.2d 926, 929 (Mo.App. 1988) (waiver and estoppel " 'cannot create a contract of insurance or so apply as to bring within the coverage of the policy property, or a loss or risk, which by the terms of the policy is expressly excepted or otherwise excluded.' "); Annot., 1 A.L.R.3d 1139, 1147 (1965). The obligations of defendants to provide coverage are defined by the policies. Absent evidence of misrepresentation as to the scope of coverage (which is nowhere to be found in this record), one can hardly conclude that any of the defendants waived their right to enforce the terms of the contracts regarding the very definition of coverage.

Similarly, the absence of an affirmative defense resting on the definition of "damages" from the answers of a number of the defendants cannot preclude them from obtaining a declaration that no coverage exists by reason of that definition. The burden is on plaintiffs to establish that a loss comes within coverage of a policy in the first instance. See, e.g., *Martin v. Prier Brass Mfg. Co.*, 710 S.W.2d 466 (Mo. App. 1986). An affirmative defense is in the nature of confession and avoidance; that is, it admits the facts alleged by the plaintiff, but relies on other facts to avoid liability on the part of the defendant. See, e.g., *World Enterprises, Inc. v. Midcoast Aviation Services, Inc.*, 713 S.W.2d 606, 608-09 (Mo.App. 1986). In a declaratory judgment action, both parties are entitled to a declaration of their rights under a contract; if the contract itself, without reference to facts other than those relied on by plaintiff, confers no enforceable rights on plaintiff, it seems superfluous to compel defendants to assert affirmatively why this is so, at the risk of creating rights which did not otherwise exist. Indeed, if the only issue is construction of a text, the court is obliged to render a declaratory judgment even on a motion to dis-

miss. *Nicolai v. City of St. Louis*, supra. Defendants have properly preserved and raised the issue presented in their motions for summary judgment.

The Meaning of "Damages"

We come at last to the heart of the matter: may plaintiffs obtain indemnity from defendants, under policies of liability insurance, for the costs they have incurred as a result of the EPA and LCRA proceedings? Each and every policy, explicitly or by incorporating language of other policies, describes the obligation of the insurer to the insured in terms of indemnifying or paying the insured sums which the insured is legally obligated to pay as damages or for damages. Plaintiffs say that their costs and expenses paid out in the anterior litigation are losses which can be characterized as damages. Defendants say that those losses are not damages, but rather costs of making restitution or of complying with regulatory laws or equitable judgments.

It is perhaps advisable at this point to adumbrate some basic principles of Missouri law which must govern this case. The interpretation of insurance policies is a question of law. Such policies are contracts and the rules applicable to construing contracts are applicable to insurance policies. *Moore v. Commercial Union Ins. Co.*, 754 S.W.2d 16, 18 (Mo.App. 1988). Missouri courts do not rewrite insurance policies. "The court cannot construe the policy to afford coverage where it does not exist, and words must be given their plain and ordinary meaning." *Protective Cas. Ins. Co. v. Cook*, supra, 734 S.W.2d 905. The court cannot adopt a meaning of a word to favor the insured if the term is not ambiguous. *MFA Mut. Ins. Co. v. Dunlop*, 525 S.W.2d 766 (Mo.App. 1975) (Gunn, Simeone & McMillan, JJ.). Of course, it cannot be gainsaid that Missouri courts have often found ambiguities not readily discernible to others. E.g., *Behr v. Blue Cross Hosp. Service, Inc.*, 715 S.W.2d 251 (Mo.

banc. 1986); *Bellamy v. Pacific Mut. Life Ins. Co.*, 651 S.W.2d 490 (Mo. banc 1983).

If an ambiguity is found in a policy, the policy is to be construed in favor of the insured, and any doubts or uncertanties about coverage must be resolved in favor of the insured; for insurance contracts are supposed to provide protection, and Missouri will see to it that they do, if possible. *Bellamy*, supra; *Bennett v. American Life & Accident Ins. Co.*, 495 S.W.2d 753 (Mo.App. 1973). However, terms which have "flexible meaning," or which are subject to differing constructions by the parties or even courts are not necessarily ambiguous; ambiguity denotes double meaning. *Crim v. National Life & Accident Ins. Co.*, 605 S.W.2d 73, 77 (Mo. banc 1980). "It is not the province of the courts to exercise inventive powers to create an ambiguity. [Footnote omitted.] Rather it is the obligation of the courts to give force and effect to contracts as written by making reasonable interpretations to accomplish the intention of the parties." *Wehmeier v. State Farm Mut. Auto. Ins. Co.*, 556 S.W.2d 739, 741 (Mo.App. 1977).

Withal, of most critical importance here is the principle that the terms of insurance policies are to be construed in accordance with the common understanding and speech of men; that is, the terms of a policy are defined as they would be by the layman who purchased the policy, unless the terms of the policy explicitly disclose that a technical or narrow meaning was meant. *Robin v. Blue Cross Hosp. Service, Inc.*, 637 S.W.2d 695 (Mo. banc 1982); *Greer v. Zurich Ins. Co.*, 441 S.W.2d 15 (Mo. 1969); *Wehmeier v. State Farm Mut. Auto. Ins. Co.*, supra.

In this Court's view, the foregoing principles compel the rejection of the opinion of Judge McMillian in *Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co.*, 842 F.2d 977 (8th Cir.) (en banc), cert. denied, 109 S.Ct. 66 (1988) (*NEPACCO*). As Judge McMillian concedes,

"from the viewpoint of the lay insured, the term 'damages' could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs, or losses." *Id.* at 985; accord, Webster's Ninth New Collegiate Dictionary, "1: loss or harm resulting from injury to person, property, or reputation 2 *pl*: compensation in money imposed by law for loss or injury . . ." This concession is fatal to the *NEPACCO* majority's conclusion that Missouri law would assign a more technical meaning to the word in an insurance policy.[4] The Missouri courts have repeatedly stated, and held, just the opposite.

The Court disagrees with Judge McMillian on another front: the word "damages," from the standpoint of a layman, is *not* ambiguous. Paradoxically, the word can be seen as ambiguous only by a lawyer, steeped in the traditional distinction between law and equity and schooled by the federal courts to be wary of liberality in the matter of jury trials. If we put to one side the distinction between law and equity (a distinction purportedly long since abolished in Missouri law, see §§ 506.010, 506.040, R.S.Mo. 1986) and the connotation of the word damages as a matter for trial by jury, we arrive at a very simple definition of the term: compensation for loss or injury sustained. Wonderful to relate, that is the very definition which the Missouri courts have consistently recognized, albeit in other contexts.

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[4] Let us clear away one of myriad possible arguments: the insurance contracts at issue in the case at bar are not "adhesion" contracts; plaintiffs and defendants each enjoy sufficient economic power that such a doctrine, concocted to protect "the little guy" is inapplicable. *Robin v. Blue Cross*, supra; *Schnuck Markets, Inc. v. Transamerica Ins. Co.*, supra. Thus, the only "reasonable expectation" to be vindicated here is that the parties' contracts would be enforced as written, in accordance with neutral principles of construction. Nevertheless, plaintiffs' sophistication *vel non* does not mean that they can be held to have accepted a specialized meaning of an undefined word in the insurance policies.

Although Missouri's courts have not had occasion to address the definition of the term "damages" in an insurance policy, they have defined the term. Significantly, consideration of the meaning of the term "damages" has come in the context of deciding whether jury instructions concerning the award of damages in personal injury actions were too vague, because they failed (in the days before Missouri Approved Instructions) to tell the jury that damages should be limited to an amount which would reasonably compensate the plaintiff. Rejecting the argument that an instruction on damages without such qualifying language failed to give adequate guidance to a jury, one court stated: "The instruction did limit the award to damages; which necessarily means compensation or reparation in money for injuries sustained . . ." *Lord v. Austin*, 39 S.W.2d 575, 578 (Mo.App. 1931). In another case with a similar jury instruction question presented, the Missouri Court of Appeals, with the later approval of the Supreme Court, noted "It was a suit to recover damages, which is a pecuniary compensation or recompense for the injury sustained." *Jablonowski v. Modern Cap Mfg. Co.*, 251 S.W. 477, 487 (Mo.App. 1923), on transfer, 279 S.W. 89 (Mo. banc 1925). See also *Jackson v. St. Louis-San Francisco Railway Co.*, 211 S.W.2d 931, at 936 (Mo. 1948) (" 'Injury means something done against the right of the party, producing damage, whereas damage is the harm, detriment, or loss sustained by reason of the injury [quoting 1 C.J.S. Action § 15(a)].' "); *Nicholas v. Kelly*, 139 S.W. 248, 250 (Mo.App. 1911) (" 'Damages are based on the idea of a loss to be compensated; a damage to be made good.' ")

The court considers the jury instruction cases to be significant, because there the Missouri courts were confronted with the meaning of the term damages as it would be understood by laymen—the jury. The meaning of the words was seen in that context as one readily capable of understanding by ordinary laymen. Should the term then

be deemed clothed with a special, technical meaning because it appears in an insurance policy? Surely not. The dictionary definition of damages, whether Webster, Random House, or another, has this much in common with any definition of damages in law: pecuniary compensation for a loss or injury. This seems to the Court in truth to be the meaning of "damages" normally understood by the average layman; and it is that definition which must be applied in the absence of a clear manifestation of contrary intent by the parties in their contract. See *Greer v. Zurich Ins. Co.*, supra, 441 S.W. at 27 (rejecting a technical definition of "repossession" as used in a policy in favor of a more common and generally understood meaning).

The Court can discern nothing in the record to show that the parties to the contracts at issue here intended that the term damages as used in these general liability policies should be read to mean only compensation recoverable by a damage suit as such. Just as in *Kammeyer v. Concordia Tel. Co.*, 446 S.W.2d 486 (Mo.App. 1969), a liability policy could not be read to confine coverage to cases where liability was imposed on a theory of negligence, *id.* at 491; here there is no reason to believe that coverage is confined to cases where the insured becomes legally obligated to pay compensation only after an action at law.

If, then, the provision of defendants in this case can be read as provision to indemnify plaintiff for all sums they shall become legally obligated to pay as *compensation*, i.e., *damages*, have the plaintiffs established enough to bring their claims—at least for purposes of the motions for summary judgment—within the ambit of coverage? In other words, having arrived at a satisfactory common understanding of the term damages, are plaintiffs' claims herein cognizable as "damages?" To answer that question, the Court must examine the nature of the claims made against plaintiffs in the EPA and LCRA litigation.

The EPA proceeding, which culminated in an order to some of the plaintiffs to clean up the Wagner Electric site, was an administrative enforcement proceeding order 42 U.S.C. § 9606(a). The order of March 27, 1985, was an order requiring plaintiffs to perform affirmative action at plaintiffs' expense, or suffer penalties of $5,000 per day. See EPA order, Ex. B to Amended Petition.

The LCRA proceeding, by contrast, was an action in federal district court, seeking recovery of "response costs," as provided by 42 U.S.C. § 9607, as well as recovery for fraud. The statute relied on by LCRA creates a specific, strict liability action against "any person who at the time of disposal of any hazardous substances owned or operated any facility at which said hazardous substances were disposed of" for "any other necessary costs of response incurred by any other person." 42 U.S.C. § 9607 (a)(B). It is as though Congress has adopted the theory of *Rylands v. Fletcher*, L.R. 1 Ex. 265, aff'd, L.R. 3 H.L. 330 (1868), but had fixed the measure of damages at the cost of repair of damage, with no attention to diminution of market value.

From the juxtaposition of the two actions, it is at once obvious that the EPA proceeding has enforcement as its object (specific performance, if you will), whereas the LCRA proceeding seeks compensation, that is, reparation for loss (response costs). Applying the plain, everyday meaning of the term damages, it is clear that plaintiffs' costs of complying with the EPA order are *not* sums they are legally obligated to pay as damages [compensation for loss or injury], to a third person. Conversely, the sums plaintiffs were obligated to pay LCRA for its response costs, by virtue of the statutory cause of action created by 42 U.S.C. § 9607(a) are very much sums plaintiffs were legally obligated to pay as damages, as a layman would understand the term.

The Court observes that its conclusion herein is quintessentially compatible with the conclusion reached in

Aetna Cas. & Sur. Co. v. Hanna, 224 F.2d 499 (5th Cir. 1955), the case relied on by the *NEPACCO* majority and by the defendants. In *Hanna*, despite an intermediate award of damages which was later reversed in state court, the plaintiffs were really trying to compel their insurer to pay the expense of complying with a mandatory injunction to abate a nuisance; the issue was not a payment to a third party for loss sustained by that party. Neither the technical nor the ordinary meaning of damages would compel a different result in such a case. See also *Ladd Const. Co. v. Ins. Co. of No. America*, 391 N.E. 2d 568 (Ill.App. 1979) (layman would understand that damages does not include an action for injunctive relief.)[5]

Thus, in this phase of plaintiffs' action, partial summary judgment must be entered against them insofar as they seek a declaration that defendants' insurance policies provide coverage for the expense of defending against or complying with the EPA order in this case. Summary judgment is also appropriate to terminate any claim against defendants for any sum paid to LCRA in excess of $605,000 (prayed-for "response costs" of LCRA) and any sums plaintiff may expend in the future to comply with the settlement of the LCRA action, which would in fact be sums spent by plaintiffs to prevent future harm or injury to LCRA. For the rest, the motions for summary judgment must be denied.

It will be argued that the Court's position does violence to the plain facts that even a layman should infer that a contract which uses the term "damages" in the same clause as "legally obligated to pay" or similar words, is

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[5] The Court expresses no view on whether a sum certain awarded to the *government* to defray the expenses of an environmental cleanup would be damages. Cf. *CPS Chemical Co. v. Continental Ins. Co.*, 536 A.2d 311, 317 (N.J. Super A.D. 1988). The Court considers it doubtful that such an award could be considered a compensatory award to a third person. However, the question is not presented by the record in this case.

using the term in a technical, lawyerlike sense, and that 42 U.S.C. § 9607(a) creates an equitable, restitutionary remedy, as different from a damages remedy as night is from day. But the Court is not persuaded. First, as expounded *ante*, the term damages has a technical meaning only in discussing distinctions between law and equity and in determining the right to trial by jury. Even the Supreme Court of the United States has recognized that a judgment which compels the payment of money can be considered "damages," subject to the doctrine of sovereign immunity, notwithstanding that the underlying action leading to the judgment is "equitable." See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (applying the Eleventh Amendment to Title VII backpay awards). It would be ironic indeed if the Court were to hold a layman to a definition of damages which is dispensed with at will by the courts themselves.

Second, the idea of restitution as a purely equitable remedy is not ineluctable as a matter of history. Quasi-contract was and is a remedy recognized at common law. As the Restatement (First) Restitution notes, "The earliest proceedings in common law courts were restitutionary in nature." *Id.*, Part I, Introductory Note at 5. Accordingly, the Restatement, at § 4, provided:

> In situations in which a person is entitled to restitution, he is entitled, in an appropriate case, to one or more of the following remedies: * * *
>
> (f) a judgment at law or decree in equity for the payment of money . . . .

Section 5 of the Restatement recognized that an appropriate proceeding in an action at law for the payment of money by way of restitution is an action of general assumpsit, a common law action. This is entirely in accord with the history of remedies involving restitution, or quasi-contract. See J. Dawson & G. Palmer, *Cases on Restitution* 1-4 (1969).

Although 42 U.S.C. § 9607 has been construed by the federal courts as creating an equitable remedy, thereby foreclosing trial by jury insofar as claims to reimbursement of "response costs" are concerned, *NEPACCO*, supra; it does not follow that the statutory cause of action has nothing in common with remedies which historically were actions at law. Indeed, the authorization of recovery of the cost of environmental cleanup by a succeeding owner of the property has many common law parallels. Thus, "[w]hatever does a lasting damage to the freehold or inheritance is waste," subjecting the party committing it to action for waste or a writ of estrepement (a remedy at law), and to treble damages. See 2 Bl.Comm. *281, *283; 3 *idem* *222, *226-*227. And whoever creates an inherently dangerous condition on his property may be strictly liable for any loss to others that it occasions. *Rylands v. Fletcher*, supra; see generally 1 T. Sedgwick *Treatise on the Measure of Damages* § 29 (Sedgwick & Beale ed. 1912).

The Court finds no fundamental incompatibility between a system of strict liability on the part of "generators" in restitution for the costs of cleanup of hazardous waste and the concept that such awards can be "damages" under a general liability insurance policy. The Court also rejects any notion that construing a general liability policy to provide coverage for a recovery of environmental cleanup costs against the insured who generated the waste, by a successor owner of the land, creates any "moral hazard," see IELA brief at 19, that waste generators will be encouraged to violate the law by not cleaning up after themselves. This assumes, first, that people will not obey the law; it likewise assumes that the criminal and civil penalties available, e.g., 42 U.S.C. § 9609, are ineffective. Finally, it would have contract interpretation turn not on what the contract means but on what *might* occur because an insured *might* decide to alter his conduct to shift an economic loss. The Court cannot accept such reasoning—particularly when what is at stake is a loss

imposed on an innocent purchaser of polluted land. The only "moral hazard" present here is that the Court will allow itself to be guided by "good social policy" rather than by the words the parties used.

Further Proceedings

Having failed to dispose of the entire controversy in this case on the motions for summary judgment, the Court must now turn its attention to the remaining claims. Under Rule 74.04(d), when a case is not fully adjudicated on a motion for summary judgment, the court is authorized to make "an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just." The Court considers that it is not appropriate to certify its partial judgment herein for immediate appeal, and believes that the entire controversy should be determined before appeal.

It is patent from the record herein that several facts cannot be disputed: (1) the terms (i.e., text) and dates of coverage of the insurance policies issued by defendants; (2) the obligations of plaintiffs under the EPA order of March 27, 1985; (3) the obligations of plaintiffs under the settlement in *Land Clearance for Redevelopment Authority v. Wagner Electric Corp.*; (4) the absence of ambiguity of the coverage provisions of the insurance policies insofar as the meaning of "damages" is concerned. The Court is confident that several other potential factual issues can be the subject of stipulation. The specified issues designated herein, and any others that the Court may designate after further pretrial proceedings, shall not, however, be the subject of further discovery or of evidence at trial in this case.

The Court has invested enough of its time in attempting to master the record in this case that it would be invidious to return the case to division 3 of this circuit

for all further proceedings. This Court will therefore retain jurisdiction of the case, will conduct a pretrial conference, and will establish a discovery schedule and trial date. The parties are advised that the Court sees no reason why all remaining issues in this case cannot be tried before the end of 1989; and the Court suggests that further motions for summary judgment would be less efficient in disposing of the case than would concerted efforts to stipulate to as many facts as possible and plenary submission of the case at trial.

ORDER AND PARTIAL JUDGMENT

In light of the foregoing, it is

ORDERED that the defendants' motions for summary judgment be and the same are hereby granted in part and denied in part; and it is

FURTHER ORDERED that a pretrial conference in this case shall be held in division 16 on Friday, October 6, 1989 at 2:00 p.m., at which a discovery schedule and trial date will be established, and it is

ORDERED, ADJUDGED AND DECREED that the defendants CONTINENTAL INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, UNITED STATES FIRE INSURANCE COMPANY, FIRST STATE INSURANCE COMPANY, LLOYD'S OF LONDON, HARBOR INSURANCE COMPANY, LUMBERMEN'S MUTUAL CASUALTY COMPANY, AMERICAN RE-INSURANCE COMPANY, MUTUAL FIRE MARINE & INLAND INS. CO., NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY, SOUTHERN AMERICAN INSURANCE COMPANY and AMERICAN EMPLOYERS INSURANCE COMPANY, have judgment in part against plaintiffs COOPER INDUSTRIES, INC., McGRAW-EDISON COMPANY, EDISON INTERNATIONAL, INC., STUDEBAKER-

WORTHINGTON, INC., and WAGNER ELECTRIC CORPORATION, on counts I and II of plaintiffs' petition as amended, and that it is declared that defendants are not liable to plaintiffs to provide insurance coverage, indemnity, or reimbursement to plaintiffs under the terms of the policies of insurance identified in the appendix to this order and judgment, which is attached hereto and incorporated herein by reference, for any sums which plaintiffs have expended or will expend for purposes of defending against or complying with that certain order of the Environmental Protection Agency entered on March 27, 1985, *In the Matter of Wagner Electric Corporation, etc., et al.*, docket no. 85-F-0023, or any orders of the Environmental Protection Agency entered pursuant or supplementary thereto; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that defendants herein named have judgment in part against plaintiffs herein named on counts I and II of plaintiffs' petition as amended, and that it is declared that defendants are not liable to plaintiffs to provide insurance coverage, indemnity, or reimbursement to plainitffs for expenses accruing to plaintiffs in the future by reason of plaintiffs' compliance with the terms of that certain settlement agreement made and entered into between certain named plaintiffs and the Land Clearance for Redevelopment Authority of the County of St. Louis in *Land Clearance for Redevelopment Authority v. Edison International, Inc., et al.*, U.S. District Court (E.D.Mo.) No. 85-1054C(5), dated May 6, 1987, and filed herein as Exhibit C to defendant Lumbermans' motion for summary judgment; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that defendants herein named have judgment in part against plaintiffs herein named on counts I and II of plaintiffs' petition as amended, and that is declared that the liability, if any, of defendants to provide insurance coverage, indemnity, or reimbursement to plaintiffs

by reason of the sums plaintiffs were legally obligated to pay to the Land Clearance for Redevelopment Authority of St. Louis County (LCRA) pursuant to the settlement agreement described herein, is limited to the maximum sum of $605,000, representing the sum of response costs sought by LCRA in the underlying federal action; and it is

FURTHER ORDERED that, with regard to the claims of plaintiffs herein as set forth in counts I and II of the petition as amended to recover sums actually paid to Land Clearance for Redevelopment Authority of St. Louis County in settlement of its claim for response costs under 42 U.S.C. § 9607(a) against plaintiffs herein, and for the expenses of defending the aforementioned action in U.S. District Court, the motions for summary judgment are denied.

SO ORDERED:

/s/ Robert H. Dierker, Jr.
ROBERT H. DIERKER, JR.
Circuit Judge

DATED: Sept. 8, 1989
cc: Counsel of Record

APPENDIX G

LISTING OF PARENTS AND SUBSIDIARIES OF CORPORATE PETITIONERS PURSUANT TO SUPREME COURT RULE 29.1

The Aetna Casualty and Surety Company. The parent of The Aetna Casualty and Surety Company is Aetna Life and Casualty Company. The only subsidiary of The Aetna Casualty and Surety Company that is not wholly-owned is Executive Re, Inc.

American Employers' Insurance Company. American Employers' Insurance Company is wholly-owned by Commercial Union Corporation, a Delaware holding company. Commercial Union Corporation is owned by Commercial Union Assurance Company p.l.c.

American Home Assurance Company. American Home Assurance Company is a wholly-owned subsidiary of American International Group, Inc.

American Re-Insurance Company. American Re-Insurance Company is a wholly-owned subsidiary of Aetna Life and Casualty Group.

Continental Casualty Company. Continental Casualty Company is a wholly-owned subsidiary of CNA Financial Corporation, a publicly-traded company. Affiliates and subsidiaries of Continental Casualty Company include CNA Management Co. Ltd., CNA Reinsurance of London Ltd., CNA Assurance Company of Connecticut, Continental Assurance Company, CNA Life and Annuity Company, Valley Forge Life Insurance Company, American Casualty Company of Reading, Valley Forge Insurance Company, National Fire Insurance Company of Hartford, Transcontinental Insurance Company, Columbia Casualty Company, Transportation Insurance Company and CNA Lloyd's of Texas.

The Continental Insurance Company. The Continental Insurance Company is a wholly-owned subsidiary of The

Continental Corporation. Its subisidaries, other than those wholly-owned, are The Marine Office of America Corporation, The Lombard Continental Insurance Company, The Maiden Lane Syndicate, The Saudi Continental Insurance Company, E.C., The South Place Syndicate, Inc., The Hong Kong Fire Insurance Company, Limited, and The Continental Insurance Company of Puerto Rico, Inc.

Employers Commercial Union Insurance Company. Employers Commercial Union changed its name to Commercial Union Insurance Company. The stock of Commercial Union Insurance Company is wholly-owned by Commercial Union Corporation, a Delaware holding company. Commercial Union Corporation is owned by Commercial Union Assurance Company p.l.c.

First State Insurance Company. First State is a wholly-owned subsidiary of New England Reinsurance Corporation, a wholly-owned subsidiary of Hartford Fire Insurance Company. In turn, Hartford Fire Insurance Company is a wholly-owned subsidiary of ITT Hartford Group, Inc., which is a wholly-owned subsidiary of ITT Corporation, the ultimate parent company and a publicly traded corporation.

Harbor Insurance Company. Harbor Insurance Company was a wholly-owned subsidiary of the Continental Corporation and was engaged in the business of underwriting and selling liability insurance policies. Harbor's licenses were sold to NAC Reinsurance Corporation. Harbor's name is no longer used and have been changed by NAC Reinsurance Corporation to Greenich Insurance Company.

Hartford Accident & Indemnity Company. Hartford Accident & Indemnity Company is a wholly-owned subsidiary of Hartford Fire Insurance Company, a wholly-owned subsidiary of ITT Hartford Group Inc. In turn, ITT Hartford Group Inc. is a wholly-owned subsidiary of ITT Corporation, the ultimate parent company and a publicly traded corporation.

Insurance Company of North America. Insurance Company of North America is a wholly-owned subsidiary of INA Financial Corporation, a wholly-owned subsidiary of INA Corporation. In turn, INA Corporation is a wholly-owned subsidiary of CIGNA Holdings, Inc., which is a wholly-owned subsidiary of CIGNA Corporation, the ultimate parent company and a publicly traded company. La Nouvelle—S.A.—(France) is the only non-wholly-owned subsidiary of Insurance Company of North America.

The Insurance Company of the State of Pennsylvania. The Insurance Company of the State of Pennsylvania is a wholly-owned subsidiary of American International Group, Inc.

Lexington Insurance Company. Lexington Insurance Company is affiliated with American International Group, Inc.

North Star Reinsurance Corporation. North Star Reinsurance Corporation is a wholly-owned subsidiary of General Re Corporation.

Stonewall Insurance Company. Stonewall Insurance Company is a wholly-owned subsidiary of Great American Insurance Company, which is a wholly-owned subsidiary of American Financial Corporation.

The Travelers Indemnity Company. The Travelers Indemnity Company is a wholly-owned subsidiary of The Travelers Corporation.

Unigard Security Insurance Company. Unigard Security Insurance Company is a wholly-owned subsidiary of John Hancock Property and Casualty Holding Company, which is a wholly-owned subsidiary of John Hancock Subsidiaries, Inc., which is a wholly-owned subsidiary of John Hancock Mutual Life Insurance Company.

FILED
APR 3 1992

No. 91-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, *et al.*,
Petitioners,

v.

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS INDEPENDENT PETROCHEMICAL CHEMICAL CORPORATION, *ET AL.*, IN OPPOSITION

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April 3, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether a court of appeals considering an unsettled question of state law that has been previously considered by a coordinate court of appeals—in the "home circuit"—is bound to follow the latter court's ruling even if that ruling is premised upon a clear misreading or misapplication of the guiding principles of state law.

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STATUTES

Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1252

CERTAIN UNDERWRITERS AT LLOYD'S LONDON, *et al.*,
Petitioners,

v.

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENTS INDEPENDENT PETROCHEMICAL CHEMICAL CORPORATION, *ET AL.*, IN OPPOSITION

STATEMENT OF THE CASE

In November, 1983, respondents, Independent Petrochemical Corporation ("IPC"), Charter Oil Company ("Charter") and The Charter Company ("TCC")[1] (here-

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[1] IPC and Charter are wholly-owned subsidiaries of TCC, which is a publicly-traded corporation. A majority (50.5%) of TCC's voting stock is owned by American Financial Corporation, a closely-held corporation. Subsidiaries of TCC, other than those which are wholly-owned, are Alaska Oil Company, Bahamas Oil Refining Company, Borco Towing Company Limited, Borco Desulferization Company, Borco Marine Company, Freeport Trading Co., Limited, and Marine Agents and Brokers, Limited.

inafter collectively referred to as IPC), filed a diversity action in the District of Columbia seeking, *inter alia*, a declaration of entitlement to insurance coverage for liability which it may incur under provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, for sums representing the cost of remedying soil contamination for which it may be legally responsible. The harm occurred at sites in Missouri, and Missouri law is applicable to the relevant contracts of insurance. The insurance contracts in issue typically provide:

> The [insurance] company will pay on behalf of the insured [Independent Petrochemical] all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damages to which this insurance applies, caused by an occurrence.

The policies do not define the term "damages" and one issue raised by IPC's suit was whether its liability for remediation of soil contamination constitutes damages covered by its insurance. There are no appellate decisions in Missouri addressing that specific issue and Missouri has no provision for certification.

Two weeks after IPC filed its suit, Continental Insurance Company filed suit seeking relief from its coverage obligations, in the United States District Court for the Western District of Missouri, against Northeastern Pharmaceutical and Chemical Co. ("NEPACCO"), which had claims against its insurers similar to those of IPC. NEPACCO had been defunct since the early 1970's, and did not appear in response to Continental's complaint. The NEPACCO case proceeded more expeditiously than the present case, and resulted in a five-to-three decision by the Court of Appeals for the Eighth Circuit in favor of Continental, before any decision was entered in the present case.

Although the NEPACCO court's majority acknowledged that "under Missouri law the language of an insurance policy is to be given the meaning that would ordinarily be understood by the lay [person] who bought and paid for the policy," it concluded that "damages" has a "legal, technical meaning" in the insurance context; that it refers to compensatory relief but does not include equitable monetary relief; and that the government's imposition of liability for environmental cleanup costs is essentially equitable. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977, 985-986 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988) ("*NEPACCO*").

The court below recognized that a "home circuit's view of state law is entitled to deference" (Pet. App. 8a). "Deference," it added, "is one thing; blind adherence quite another." (Pet. App. 9a). "The decision of the home circuit need not be followed if it has *clearly misread* state law." *Ibid.* (Emphasis in original). This, it said, is that "rare" case. *Ibid.*

The reasons for the conclusion by the court below that the Eighth Circuit had clearly misread Missouri law may be summarized briefly. "As the NEPACCO majority itself acknowledged, the lay insured would not distinguish between legal and equitable relief when construing damages." (Pet. App. 10a). "At least one Missouri trial court has interpreted 'damages' this way in a case involving the same insurance policy language at issue here." *Ibid.* Missouri jury instructions on the issue of damages in negligence actions reflect the view that the cost of repairing or restoring property is a form of damages. (Pet. App. 11a). Research "reveals that, with the exception of *NEPACCO*, in every case in which the operative state's rules of insurance contract interpretation required—as Missouri's does—resort to the common and ordinary understanding of language, the word 'damages' has been construed to cover reimbursement for environmental response costs. . . ." (*Ibid.*) "Technical meaning

is the exception rather than the rule in Missouri, and the insurers therefore had to show that the parties intended to be bound by it." (Pet. App. 12a). This they failed to do.

SUMMARY OF ARGUMENT

The petitioners ask this Court to impose a new standard of deference, without any support in precedent, requiring that a federal circuit court of appeals decision on an unsettled question of the law of a state within that circuit (the "home circuit") be followed by all federal courts until such time as that decision is overruled by the state's highest court or the legislature of the state in question. In particular, they assert that another circuit is bound to follow the "home circuit" decision even when it finds that the "home circuit" clearly misread state law. There is no basis for adoption of such a rule.

The court below carefully reviewed the previous decision of the Eighth Circuit and the relevant Missouri precedents. After a thorough and searching assessment, it concluded that it had to reject the Eighth Circuit decision as clearly contrary to Missouri law. That procedure was in accord with this Court's teachings on the appropriate deference to be given to federal court decisions on undecided questions of state law.

The decision of the court below also was in accord with the law of the various circuits on the appropriate degree of deference to be shown to decisions of a sister circuit court. Thus, the decision of the court below does not raise any conflict between the circuits. Therefore, there is no ground for review by this Court, and the petition for certiorari should be denied.

ARGUMENT

I. THE STANDARD OF DEFERENCE GIVEN BY THE COURT BELOW TO THE "HOME CIRCUIT" IS IN FULL ACCORD WITH PRONOUNCEMENTS OF THIS COURT

Petitioners ask this Court to grant review on the ground that there is a conflict between the decision below and the decision of the Second Circuit in *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) ("*Factors*"). The court below, they point out, declined to follow the "home circuit" because it concluded that the court had "clearly misread" Missouri law. The Second Circuit, petitioners assert, has a "standard of 'conclusive' deference," subject only to very limited exceptions. Specifically, they claim that a finding that a "home circuit" decision "clearly misread" state law is not grounds for declining to follow that decision in the Second Circuit's view. This Court, they urge, should impose the Second Circuit's "conclusive" standard on all federal circuit courts of appeals.

Before addressing petitioners' reading of *Factors* and its claim of an inter-circuit conflict of decision (with which we disagree), we stress at the outset that this Court has repeatedly considered, over the course of the last half-century, the cognate question of the measure of deference that it will accord to decisions of courts of appeal on issues of local law. This Court's decisions demonstrate that the standard petitioners ask this Court to adopt would be a marked departure from anything it previously has approved. While there are minor variations in the Court's articulation of the standard, this Court never has said that it will regard the determination of state law by a federal court of appeals as conclusive.

The Court consistently has rejected any such approach, either implicitly or expressly. *See, e.g., Palmer v. Hoff-*

man, 318 U.S. 109, 118 (1943) (will follow ruling of lower federal courts "except on a plain showing of error"); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily" will accept but will review "in exceptional cases"); *Propper v. Clark*, 337 U.S. 472, 486-487 (1949) ("hesitant to overrule" unless "shown to be unreasonable"); *General Box Co. v. United States*, 351 U.S. 159, 165 (1956) ("ordinarily accept"); *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960) (will accept if not "clearly erroneous or unreasonable"); *Runyon v. McCrary*, 427 U.S. 160, 181 (1976) ("not persuaded that the Court of Appeals was mistaken"); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985) ("*Brockett*") ("The rule [of deference] is not ironclad, however, and we surely have the authority to differ with the lower federal courts . . ."); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 224 (1985) (accepting "reasonable rendering of state law, particularly when no party has challenged it").[2]

There is no sound reason to suggest that a court of appeals' ruling on a question of local law has a greater presumption of correctness when it comes before a sister court of appeals than when it comes to the attention of this Court. Certainly, this Court has never intimated that in either case there is a requirement of blind adherence. Indeed, the fact that this Court has "limited resources in the exercise of its discretionary jurisdiction" underscores the obligation of courts of appeals to give careful consideration to issues of local law. *Salve Regina College v. Russell*, —— U.S. ——, 111 S. Ct. 1217, 1223

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[2] *Cf. Salve Regina College v. Russell*, —— U.S. ——, 111 S. Ct. 1217, 1225 (1991), holding that courts of appeals must review *de novo* district courts' determinations of state law in diversity actions, and noting that "the bases of state law are as equally communicable to the appellate judges as they are to the district judge." Appellate judges of a "home circuit" and appellate judges of another circuit, likewise, are equally able to receive communications of the bases of state law.

n.3, 1224 (1991) (defining the standard of review of district court decisions on issues of state law.)

Consonant with this Court's pronouncements, the court below expressly recognized that a decision of the "home circuit" is entitled to a strong measure of deference and is ordinarily to be followed. It also recognized, however, that the rule of deference is not "ironclad" (*Brockett, supra*) and does not require "blind adherence" in the "rare" case where the home appellate court has "clearly misread state law." (Pet. App. 9a).

It is evident, moreover, that the court below did not give mere lip service to the rule of deference. We have only briefly identified in the Statement (*supra*, pp. 3-4) the salient points which led it to conclude that the Eighth Circuit had plainly misapplied governing principles (those relating to interpretation of contracts of insurance) of Missouri law. We do not elaborate on the state law issue since the only question raised by the petition relates to the standard of deference. We do, however, invite attention to the portions of the opinion that examine the underlying issue (see, especially, Pet. App. 9a-14a) because they demonstrate that, far from lightly rejecting the *NEPACCO* ruling, the court did so only after a thorough and searching assessment.[3]

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[3] Although petitioners assert that the court below "cited no existing Missouri precedent that the Eighth had overlooked, . . . nor any subsequent ruling by the Missouri Supreme Court, nor any other Missouri appellate court addressing the issue" (Pet. 7), the court below cited numerous Missouri appellate cases which supported its finding that awards of the costs remedying environmental harm are "damages" covered by the insurance policies sold by petitioners, decisions which had been ignored by the *NEPACCO* majority. *Compare*, *NEPACCO*, 842 F.2d at 985-87, with the opinion below, Pet. App. 9a-12a. The court below noted those decisions as further support for its central holding that *NEPACCO* failed to apply the Missouri law principles which it did recognize. The court below also cited a subsequent Missouri appeals court decision holding that the term "damages" in an insurance policy is to be read broadly, as

II. THERE IS NO CONFLICT OF DECISIONS AND NO OCCASION FOR REVIEW BY THIS COURT

A. Petitioners pin their application for the writ upon the Second Circuit's decision in *Factors*, which they interpret as precluding a court of appeals from declining to follow a "home circuit" on the ground that the latter court has "clearly misread" state law. On the basis of this interpretation, they say that the decision below is in conflict and urge this Court to adopt their version of the Second Circuit's ruling.

The *Factors* opinion states (652 F.2d at 283):

> A federal court in another circuit would be obliged to disregard a state law holding by the pertinent court of appeals if persuaded that the holding had been superseded by a later pronouncement from state legislature or judicial sources . . . or that prior state court decisions had been inadvertently overlooked . . . . Where, as here, the pertinent court of appeals has essayed its own prediction of the course of state law on a question of first impression within that state, the federal courts of other circuits should defer to that holding, perhaps always, and at least in all situations except the rare instance when it can be said with conviction that the pertinent court of appeals has disregarded clear signals emanating from the state's highest court pointing toward a different rule.

Explaining the notion of "clear signals," the *Factors* opinion concludes that "We should defer to the views of the Sixth Circuit unless we can point to a *clear basis* in Tennessee law for predicting that the Tennessee courts . . . would conclude that the Sixth Circuit's prediction was incorrect." *Ibid.* (emphasis added).

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including all forms of monetary liability, including an award of attorneys' fees. Pet. App. 14a, citing *Hyatt Corp. v. Occidental Fire & Casualty Co. of North Carolina*, 801 S.W.2d 382, 393 (Mo. Ct. App. 1990).

Several years after *Factors* was decided, the District of Columbia Circuit had before it a case, which, like the instant case, involved interpretation of a provision in an insurance contract. The contract was governed by New York law and the Second Circuit, as it happened, had passed upon the same issue. Judge Edwards, who also was a member of the panel in the instant case, expressed his agreement with Judge Newman's *Factors* opinion (quoting from the passages we have set forth above). He then set forth his understanding of that opinion:

> For these reasons, we will defer to the local circuit's view of the law of a state in its jurisdiction when that circuit has made a reasoned inquiry into state law, unless we are convinced that the court has ignored clear signals emanating from the state courts. Only when we are certain that the pertinent circuit has *clearly misread* state law would it make sense to reject that circuit's view of state law. In such a case, our adoption of a clearly incorrect reading of state law would do nothing to prevent forum shopping. Litigants would still choose a federal forum whenever the circuit's reading of state law is more favorable than that actually adopted by state courts. We are convinced, however, that such a clear misreading of state law will rarely occur.

Abex Corp. v. Maryland Casualty Co., 790 F.2d 119, 125-126 (D.C. Cir. 1986) ("*Abex*") (emphasis in original).[4]

In the instant case, the court below followed its *Abex* ruling, stating that the *NEPACCO* decision was entitled to deference and that it would decline to follow it only if the Eighth Circuit had ignored "clear signals" from the state courts or "clearly misread" state law. (Pet. App. 9a).

Although the District of Columbia Circuit has expressed its approval of the approach it finds indicated by *Factors*, petitioners argue that the circuits actually are in con-

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[4] The *Abex* court did in fact defer to the Second Circuit's ruling on the state law question at issue.

flict. They would read Judge Newman's opinion as permitting a departure from a "home circuit" ruling only when that circuit overlooked prior state court decisions or when a superseding state legislative enactment or a state judicial pronouncement has intervened between the "home circuit's" ruling and the sister circuit's confrontation of the state law issue. To be sure, these are Judge Newman's examples of instances in which departure would be clearly appropriate. *See Factors*, 652 F.2d at 282, 283. They need not be read, however, as the exclusive reasons. There may be other clear signals, as the concluding language of his opinion recognized, providing "a clear basis in [state] law for predicting" that the state courts, if confronted with the same issue, would not act in accordance with the "home circuit's" prediction. 652 F.2d at 283.

That basis is present if a court of appeals, while not overlooking the principles of state law that provide guidance, fails to follow them because it mistakenly believes that another principle governs. A decision clearly misreading or misapplying state law has no more claim to binding effect upon a coordinate court than one that has completely overlooked the applicable principles of state law.

B. However one reads the *language* of *Factors*, it is plain that there is no *holding* by the Second Circuit that a coordinate court of appeals is bound to follow a clearly erroneous reading of state law by the "home circuit." In *Factors* the Second Circuit was called upon to predict how the courts of Tennessee would decide, under that State's common law, whether a person has a protected interest in publicizing his name and likeness after his death. The Sixth Circuit previously had considered the same question. *Memphis Development Foundation v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). That circuit found (and the Second Circuit later agreed) that "Tennessee courts have not addressed this issue directly or indirectly, and we

have no way to assess their predisposition." 616 F.2d at 958.

The Sixth Circuit therefore felt obliged to make its prediction "in the light of practical and policy considerations, the treatment of other similar rights in our legal system, the relative weight of the conflicting interests of the parties, and certain moral presumptions concerning death, privacy, inheritability, and economic opportunity." *Ibid.* Speaking for the Second Circuit, Judge Newman thereafter observed that "reasonable minds" might differ "as to the preferable course that the common law of Tennessee ought to follow" (652 F.2d at 282), but that deference should be accorded to the Sixth Circuit's assessment unless there was "clear basis" in Tennessee law for concluding that its "prediction was incorrect." *Id.*, at 283. "[W]e are unable to find any such indication in Tennessee law . . . ." *Ibid.*

Factors, then, is a case, perhaps unique, in which the two federal courts that examined a determinative issue of state law both declared themselves unable to find any guidance whatever in the State's jurisprudence. Whatever the implications of selected passages in Judge Newman's opinion, *Factors* cannot constitute a holding that a coordinate court of appeals is bound to accept a clearly erroneous determination of state law by the "home circuit." Neither this Court nor any court of appeals ever has held that. Such a holding, moreover, could not be squared with this Court's considered rulings as to the appropriate standard of deference. (Point I, *supra*).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 91-1252

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, *et al.*,
Petitioners,

v.

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

Respondents offer two arguments in opposition to the petition: (1) there is no conflict between the Second Circuit and the D.C. Circuit; and (2) the approach taken by the D.C. Circuit in this case is in accord with the decisions of this Court. Neither agrument has merit.[1]

I. HAD THIS CASE BEEN ADJUDICATED IN THE SECOND CIRCUIT, PETITIONERS WOULD HAVE PREVAILED

The Second Circuit has crafted a clear and unmistakable standard of deference to a home circuit's ruling on an unsettled question of state law. The home circuit's

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[1] Petitioners incorporate by reference their list of parties contained in footnote 1 of their Petition for a Writ of Certiorari filed February 3, 1992, in Supreme Court No. 91-1252. Petitioners also incorporate by reference their respective Rule 29.1 statements appearing in Appendix G thereto.

ruling must govern unless it: (a) overlooked existing state precedent; or (b) was superseded by state judicial or legislative pronouncement. *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). *Factors* makes clear that, in the absence of one of these two stated exceptions, revisiting the home circuit's interpretation and application of state law is inappropriate "[h]owever our sense of the common law might lead us to resolve the merits of this case . . . ." *Id.* at 283.

The D.C. Circuit did not find that the home circuit decision in *Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co.*, 842 F.2d 977 (8th Cir.) (*en banc*), *cert. denied*, 488 U.S. 821 (1988) (*"NEPACCO"*), had overlooked state precedent or had been superseded by state judicial or legislative pronouncement. Indeed, the D.C. Circuit acknowledged that the *en banc* decision of the Eighth Circuit had duly considered the relevant principles of Missouri law. But, because the D.C. Circuit had a different sense of how to resolve the merits of the case, it simply substituted its own conclusions for those of the home circuit. *Factors* does not sanction this approach.

The Second Circuit's standard of deference promotes uniformity and equitable administration of state laws in federal diversity cases. The subjective approach followed by the D.C. Circuit produces exactly the opposite result, as evidenced by the outcome in this case. Consider this anomaly: Continental Insurance Company, a party in *NEPACCO* and here, is not obligated to indemnify NEPACCO but must indemnify IPC on the same loss and under the same policy language, simply because IPC filed suit in the D.C. Circuit.

If this case had been adjudicated in the Second Circuit (or, of course, the Eighth Circuit), petitioners rather than respondents would have prevailed. It could hardly be more clear that the two circuits are in conflict and that the conflict is one that affects the just resolution of

cases (like the present insurance coverage action) that could be brought in more than one circuit.

II. THE APPROACH THIS COURT HAS TAKEN IN REVIEWING STATE LAW RULINGS OF FEDERAL COURTS DOES NOT DETERMINE THE DEFERENCE A CIRCUIT COURT SHOULD ACCORD TO THE HOME CIRCUIT

Respondents miss the point in arguing (Opp. at 5-6) that the approach this Court traditionally adopts in reviewing determinations of state law by federal courts of appeal makes it unnecessary for this Court to address the relationship among circuits when issues of state law arise. This Court's interpretation of state law obviously binds all federal trial and appellate courts on the state law point at issue unless and until the state's judiciary or legislature decides otherwise. The fact that this Court might therefore choose not to defer to a federal appellate court's determination of state law says nothing about the extent to which one circuit must defer to a co-equal home circuit. It is undisputed that this Court has never specifically addressed the deference sister circuits must accord to one another. Prior decisions of this Court concerning its own review of state law issues do not address, much less resolve, the conflict between the Second Circuit and the D.C. Circuit on this issue.

Petitioners respectfully submit that the grant of certiorari in this case is the appropriate way to supervise the circuits' determination of state law, thereby promoting uniformity of decision throughout the federal judicial system.

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